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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1935~~

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

COLEMAN-GILBERT ASSOCIATES

No. 79

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

COLEMAN-GILBERT ASSOCIATES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 27, 1935

CERTIORARI GRANTED OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 78

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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1 [Caption omitted.]

Before United States Board of Tax Appeals

Docket No. 51557

COLEMAN-GILBERT ASSOCIATES, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Petitioner: Henry Herrick Bond, Esq., Ralph E. Tibbetts, Esq.

For Respondent: C. A. Ray, Esq.

Docket entries

Transferred to Mr. Murdock, 12/8/33.

1930

Dec. 23—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 23—Copy of petition served on General Counsel.

1931

Jan. 17—Answer filed by General Counsel.

Jan. 26—Copy served, assigned General Calendar.

2 1932

Oct. 11—Hearing set November 17, 1932.

Oct. 20—Motion to transfer to the Boston, Mass., Circuit Calendar filed by taxpayer. 10/22/32 granted.

1933

Apr. 26—Notice of appearance of Ralph E. Tibbetts as counsel filed.

June 7—Notice of hearing at Boston, Mass., be[illegible]ng July 10, 1933.

July 13—Hearing had before Mr. Smith—submitted. Stipulation of facts filed. Petitioner's brief due in 60 days—respondent's due in 60 days. (Called 7/10/33.)

Aug. 7—Transcript of hearing 7/13/33 filed.

Sept. 2—Brief filed by taxpayer.

1934

June 1—Memorandum opinion rendered—J. E. Murdock, Division 3. Decision will be entered for respondent.

June 4—Decision entered—J. E. Murdock, Division 8.

Aug. 30—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.

Sept. 1—Proof of service filed by taxpayer.

Sept. 26—Agreed statement of evidence lodged.

Sept. 27—Agreed statement of evidence approved and ordered filed.

Oct. 8—Praecipe filed.

Oct. 8—Proof of service filed.

Oct. 27—Order enlarging time for transmission and delivery of record to Nov. 15, 1934, entered.

Before U. S. Board of Tax Appeals

Petition

Filed December 23, 1930

(IT:AR:B-3 CEO-60D)

The above petitioner hereby petitions for a redetermination of deficiencies set forth by the Commissioner of Internal Revenue in his notice of final determination dated November 6, 1930, and as a basis of this proceeding alleges as follows:

3 (1) The petitioner, Colman-Gilbert Associates, is a trust organized by law and having its principal place of business in Boston, Mass.

(2) Notice of deficiency, a copy of which is attached and marked "Exhibit A", was mailed to the petitioner on November 6, 1930.

(3) The taxes in controversy are the income taxes for the calendar years 1927 and 1928, the amounts of said deficiencies being as follows:

For 1927	$10,975.78
For 1928	9,327.66
Total	20,303.44

(4) The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) Said deficiencies are not due under a proper construction of the Revenue Acts of 1926 and 1928 and amendments thereto and regulations relative thereto.

(b) The Commissioner has erred in taxing your petitioner as an association under said acts, your petitioner being, if it exists at all, a Massachusetts trust, so called, and not taxable under said acts.

(c) The Commissioner has erred in taxing your petitioner as an association under said acts for the further reason that by the execution of the trust instrument hereinafter referred to and attached hereto as "Exhibit B" the legal and equitable interests in certain real estate were vested in the same persons, and said interests, under the laws of the Commonwealth of Massachusetts, thereupon merged, thereby depriving your petitioner of all title in and to the property the income of which is alleged to be the income of your petitioner.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to November 5, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine were tenants-in-common of certain parcels of real estate located in the city of Boston. These properties were suitable for rental and were handled by the five individuals as a joint venture, being operated as a single unit in the nature of a partnership undertaking. The interest
4 of Bernard Gilbert in the properties was two-sixths, and that of each of the others above named was one-sixth.

(b) On November 5, 1926, the five individuals undertook to put the said properties into a trust by an instrument in writing, constituting themselves the "Coleman-Gilbert Associates", and taking legal title to such property into their own names as trustees. Their respective beneficial interests in said properties remained as before, and the so-called "trust" continued to conserve said properties, collect rents, and distribute the net proceeds in the same manner as before the formation of said trust, all net returns being divided among the trustees according to their respective beneficial interests, and the procedure of handling the properties after the formation of the trust was identical with that previously followed. The same books of account were kept continuously and the same character of entries made. None of the individuals before the formation of the trust or subsequent to it received any remuneration for services or were in any other way compensated other than to receive his or her respective share in the net proceeds.

(c) The trust instrument purported to limit the liability of the trustees to the trust property and by its terms precluded the possibility of any of the beneficial interests, who were also the trustees, from seeking a subdivision of the property under the provisions of the laws of the Commonwealth of Massachusetts, and it was for this purpose that the said trust was formed. No certificates of stock were issued to the beneficial owners. Certain provisions as to investment and reinvestment were inserted in the trust instrument as a precautionary measure, but were purely incidental and in aid of the conservation of the property originally put into the trust and as an aid to the liquidation of said property, and not with the idea and purpose of permitting the carrying on of a general real-estate business for speculative purposes or otherwise.

Wherefore your petitioner prays that this Board may hear the proceeding and determine that no deficiencies exist for said years.

Respectfully submitted.

HENRY HERRICK BOND,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

5 [*Duly sworn to by Harry Coleman et al. Jurat omitted in printing.*]

NP–2–26–28

Exhibit A to petition

TREASURY DEPARTMENT,
Washington, Nov. 6, 1930.

COLEMAN AND GILBERT ASSOCIATES,
339 Huntington Avenue, Boston, Massachusetts.

SIRS: You are advised that the determination of your tax liability for the years 1927 and 1928 discloses a deficiency of $20,303.44 as shown in the statement attached.

In accordance with section 274 of the Revenue Act of 1926 and section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability for the years in which a deficiency is disclosed.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your returns by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET, *Commissioner.*
By J. C. WILMER, *Deputy Commissioner.*

Enclosures: Statement; Form 882; Form 870.

STATEMENT

IT:AR:B-3 CEO-60D

In re: Coleman and Gilbert Associates, 339 Huntington Avenue, Boston, Massachusetts.

Tax liability

Year	Corrected tax liability	Tax previously assessed	Deficiency
1927	$10,975.78	None	$10,975.78
1928	9,327.66	None	9,327.66
Total	20,303.44	None	20,303.44

Reference is made to office letter dated April 19, 1930, wherein you were advised that your organization was held to be taxable as an association as defined by articles 1502 and 1504 of Regulations 69 for 1927. Since the issuance of the above letter, the Bureau has given further careful consideration to the question at issue.

It has been determined that the beneficiaries of the trust are the trustees; and that the beneficiaries actually control the trustees. The trust is engaged in business in quasi-corporate form. Although the chief property of the trust is realty, the trust instrument provides that the interests of the beneficiaries shall be personalty, thereby changing the ordinary rule that obtains in strict trusts. The interests

of the beneficiaries are thus made to resemble those of stockholders in a corporation. The trustees under the terms of the trust instrument have discretion similar to that of directors of a corporation either to distribute income or to use it in developing or improving the corpus, whereas except for such provision, under the rule of strict trusts, they would be required to distribute income. The trust instrument expressly provides that there shall be no personal liability
7 on the part of either trustees or beneficiaries for debts of the trust. There is nothing in the trust instrument restricting the free assignability of the beneficial interests in the trust.

It also appears that the trustees are engaged in operating some twenty large apartment houses, and that under the terms of the present trust instrument the trustees may buy and sell real estate, or stocks or bonds, or other securities. Further there is nothing in the trust instrument to prevent the trustees from engaging in the business of dealing in real estate for the trust. While it is true that the life of the trust, under its terms, is set nominally at fifteen years, still the trustees have the power to transfer the assets to another trustee or trustees, or to a corporation, and no limit of time is set on such new trust or corporation, so that the trust assets might thus remain, if not in the present trust, then in another, or in a corporation with only such limitations as the beneficiaries might see fit to impose. Moreover, there is no evidence that the trustees ever tried to sell the property or did anything more than operate the apartment houses.

Based on the above facts, the Bureau concludes that Coleman and Gilbert Associates is taxable as an association, and accordingly your contention that the organization is a trust and the income thereof taxable to the beneficiaries is denied.

With respect to the year 1928, it does not appear that there has been any change in the declaration of trust. Accordingly the ruling for the year 1927 is equally applicable to 1928.

A copy of this letter has been mailed to your representative, Mr. Henry Herrick Bond, No. 73 Water Street, Boston, Massachusetts, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

Net income reported on return taxable at 13½%----------	$81,302.11
Tax liability----------	10,975.78
Tax previously assessed----------	None
Deficiency in tax----------	10,975.78

8 1928

Net income reported on return taxable at 12%----------	$77,702.53
Tax liability----------	9,327.66
Tax previously assessed----------	None
Deficiency----------	9,327.66

Exhibit B to petition

DECLARATION OF TRUST

This Declaration of Trust made this 8th day of November 1926, Witnesseth:

Whereas Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, all of Brookline in the County of Norfolk and Commonwealth of Massachusetts, have conveyed to Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine by deed of even date to be recorded herewith certain real estate in the City of Boston, particularly described in said deed, reference to which is hereby made.

Now, therefore, we, the said Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, do hereby declare that the real estate conveyed to us as aforesaid, and any real estate, or interest in real estate, hereafter acquired under this trust, is and shall be upon the trusts to the uses, for the purposes, and with the powers and limitations following:

First. That the trust shall be designated as the "Coleman-Gilbert Associates."

Second. That the trust shall terminate in fifteen years (15) from the date hereof, unless sooner terminated by sale and distribution of the trust estate, or otherwise, as hereinafter provided.

Third. The Trustees, their successor or successors, or the trustees hereunder for the time being hereinafter referred to as the "Trustees" shall hold said real estate and any real estate or interest therein hereafter acquired under this trust, subject to the provisions of this instrument in order to improve and dispose of the same for the benefit of the persons hereinafter named as cestuis que trustent
9 and beneficiaries, and their respective representatives and assigns, devisees, or legatees in the shares hereinafter provided.

Except as hereinafter set forth, the said cestuis que trustent or beneficiaries shall have no right or interest in the trust property itself from time to time held by said trustees, and especially they shall have no right to call for any partition thereof. The interests of said beneficiaries shall be personal property carrying the rights hereinafter set forth. The death of any or all of the said beneficiaries during the continuance of this trust shall not determine the trust nor entitle his or her legal representatives to an accounting by the trustees, nor to any suit or action at law or in equity against the trustees, but the executors, administrators, assigns, legatees, or devisees of the deceased beneficiary shall succeed to the rights of such decedent under this trust.

Fourth. (a) The trustees shall have as full power and discretion as if they were the absolute owners of said trust property, to invest and reinvest the trust property, including also income in mortgages, bonds, notes, or other obligations secured upon real estate, and in the purchase and improvement of real estate, and in the purchase and

improvement of real estate situated in the cities or towns of the Commonwealth of Massachusetts. All real estate or interest therein so purchased shall be conveyed to them as trustees hereunder.

(b) The trustees shall have full power and discretion as if absolute owners of said trust property, to sell, transfer, and convey from time to time at public or private sale any part of all of the trust property upon such terms and conditions as they shall see fit, and to invest the proceeds in the same manner and upon the same trusts as the original trust estate.

(c) Without in any manner limiting the powers of the trustees as hereinbefore provided in paragraph (b), it is expressly declared that said trustees shall have absolute control over and power to dispose of all real estate held by them at any time under this trust, including therein powers to sell and convey in fee simple or for any less estate free and discharged of all trusts, at public auction or by private sale, either for cash or upon credit or partly for cash and partly for credit, and to receive, assign, give partial releases from, or discharge any mortgage taken as part consideration for such sale or sales, to improve, to lease for a term beyond the possible termination of this trust or for any less term, to hire for improvement or otherwise, to let, to exchange, to release, to partition, and to make, execute, acknowledge, and deliver all necessary deeds, agreements, and other instruments relating to the trust estate.

(d) The trustees may borrow money for such time and upon such terms as they shall see fit, and may secure the payment of any money borrowed by mortgage or mortgages to be drawn either with or without a power of sale clause, and said trustees in their discretion may pledge as collateral security for any loan any mortgages, mortgage, leases, or lease forming part of the trust property. The trustees shall execute and deliver such notes or other evidences of indebtedness as may be necessary in the premises.

(e) The trustees shall have full power to cancel and discharge mortgages by deed or otherwise on payment or satisfaction thereof. The execution by the trustees of all contracts, of all conveyances and transfers, and of any and all other instruments relating to the trust property, or any part thereof, shall be deemed sufficient.

(f) At any time during the continuance of the trust the trustees may act and determine all questions hereunder, may make sales, borrow money, execute deeds, mortgages, and other instruments, and shall have and may exercise all and every power, right, interest, and discretion herein given or imposed upon said trustees.

No purchaser, lender, corporation, associates, or officer or transfer agent thereof dealing with trustees shall be bound to make any inquiry concerning the validity of any sale, pledge, mortgage, loan, or purchase purporting to be made by said trustees, nor be liable for the application of money paid or loaned to said trustees.

Fifth. Whenever said trustees shall have funds in their possession, the proceeds of sales or otherwise, or net income, not required in their

judgment for development or improvement of the trust property, they shall divide and pay over the same annually, or oftener, if convenient to said trustees, equally among the said beneficiaries and their respective representatives and assigns in the following proportions:

11 Harry Coleman, one-sixth; Pauline Coleman, one-sixth; Bernard Gilbert, two-sixths; Harris Levine, one-sixth; and Lena Levine, one-sixth.

But said trustees may in any case retain such an amount as they deem necessary for payment of debts and expenses of the trust whether due and payable or future and contingent.

Sixth. The trustees shall have no power to bind the beneficiaries personally, and in every written contract made by said trustees reference shall be made to this declaration of trust, and the person or persons or corporation so contracting or dealing with the trustees shall look only to the funds and property of the trust for payment under any contract, or for payment of any debt, damage, judgment or decree or of any money that may otherwise come due and payable by reason of the failure on the part of the trustees to perform such contract in whole or in part, and neither the trustees nor the beneficiaries, present or future, shall be personally liable therefor. Each trustee shall be responsible for his own wilful default and breach of trust, only, and shall not be responsible for honest error of judgment.

Seventh. The trustees and any trustee hereunder may resign his trust by written instrument signed and sealed by him and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument shall be recorded in the Registry of Deeds for the County of Suffolk. In case of death or resignation of a trustee, the continuing or surviving trustee shall have power to appoint a co-trustee. An instrument recorded in Suffolk County Registry of Deeds signed by the continuing or surviving trustees certifying the appointment of their co-trustees, together with the acceptance of the trust by said new trustees, shall be conclusive evidence of the appointment of said new trustee. Each and every new trustee shall have the same powers, rights, and interest and be subject to the same duties touching the trust estate as the original trustees. In the event of the death of all of the trustees, or in the event that the office of trustee shall become vacant because of failure to appoint as above provided, the beneficiaries hereunder shall have the right to appoint a new trustee to act, and such appointment shall be signed, sealed, acknowledged as aforesaid, and together with the ac-

12 ceptance of this trust by the new trustee shall be recorded in said Suffolk County Registry of Deeds.

Eighth. The trustees may terminate this trust at any time by sale of the trust estate and division of the proceeds thereof among the said cestuis que trustent and beneficiaries and their respective representatives, assigns, legatees devisees, in the shares hereinbefore provided, being first duly indemnified for any outstanding obligation or liability, and shall thereupon be forthwith discharged. At

the expiration of said term of fifteen years, said trustees shall terminate this trust by sale and distribution of the proceeds among said beneficiaries and their respective representatives, assigns, legatees, or devisees, in the shares hereinbefore provided, to wit: Harry Coleman, one-sixth; Pauline Colman, one-sixth; Bernard Gilbert, two-sixths; Harry Levine, one-sixth; and Lena Levine, one-sixth, being first duly indemnified for any outstanding obligations or liability, and all powers herein given said trustees shall continue for the purpose of such sale and distribution of the proceeds. The trustees may alter (except that no such alteration shall extend the term of this trust beyond fifteen years from the date hereof) or add to this declaration, or terminate this trust, and if it seems to them judicious so to do, they may convey the trust fund to a new or other trustee or trustees, or to a corporation, being first duly indemnified for any outstanding obligation or liability. The instrument setting forth such alteration, addition, termination, or conveyance shall be executed by the trustees and acknowledged in the manner provided for acknowledgment of deeds and recorded in said Registry of Deeds. Any such instrument shall be conclusive of the existence of all facts and of compliance with all pre-requisites necessary to the validity or such alteration, addition, termination or conveyance, whether stated in such instrument or not, upon all questions as to title or affecting the rights of third persons.

Provided, however, and it is especially declared, that the trustees shall be under no obligation to terminate this trust or convey the trust fund, except as hereinbefore provided.

In witness whereof said trustees hereunto set their hands and seals on the eighth day of November 1926.

HARRY COLEMAN. [SEAL]

13

PAULINE COLEMAN [SEAL]
BERNARD GILBERT [SEAL]
HARRIS LEVINE [SEAL]
LENA LEVINE [SEAL]

Witness to all signatures:
DAVID LASKER.

And we, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, being the cestuis que trustent above referred to and the only persons beneficially interested in the property conveyed by said deed above referred to said Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, trustees hereby signify our assent to and approval of the above declaration of trust.

HARRY COLEMAN.
PAULINE COLEMAN.
BERNARD GILBERT.
HARRIS LEVINE.
LENA LEVINE.

Witness to all signatures:
DAVID LASKER.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, *November 8, 1926.*

Then personally appeared the above-named Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, and acknowledged the foregoing instrument to be their free act and deed, before me

DAVID LASKER, *Notary Public.*

My commission expires Sept. 28, 1928.

Before U. S. Board of Tax Appeals

Answer

Filed January 17, 1931

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the petitioner, Coleman-Gilbert Associates, has
14 its principal place of business in Boston, Massachusetts, and denies the remaining allegations of paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the allegations contained in paragraph (3) of the petition.

(4) Denies that the respondent erred in the determination of the deficiency as alleged in paragraph (4) of the petition, subparagraphs (a), (b), and (c).

(5) (a), (b), and (c). Denies the allegations contained in subparagraphs (a), (b), and (c) of paragraph (5) of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that petitioner's appeal be denied.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Of counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

Before United States Board of Tax Appeals

GOLEMAN-GILBERT ASSOCIATES, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 51557, 62960

Ralph E. Tibbets, Esq., for the petitioner.
C. A. Ray, Esq., for the respondent.

Memorandum opinion

Entered June 1, 1934

MURDOCK: The Commissioner determined deficiencies as follows:

Docket No.	Year	Deficiency
51557	1927	$10,975.78
62960	1928	9,327.66
	1929	2,241.39

15 The Commissioner determined each of these deficiencies on the theory that the petitioner was an association taxable as a corporation in each of the years. The term "corporation" is defined in Section 2 (a) (2) of the Revenue Act of 1926 and in Section 701 (a) (2) of the Revenue Act of 1928 as including associations. The only issue in this case is whether or not this petitioner is an association and, therefore, taxable as a corporation under those two revenue acts. The parties filed a stipulation of facts as follows:

The petitioner was created November 8, 1926, under an indenture of trust. A copy of this indenture is attached hereto and made a part hereof, which copy may be accepted in all respects as if it were an original.

The creators of the trust Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine named themselves trustees of the petitioner and deeded certain land which they had held to the petitioner.

The property in question, consisting of some twenty apartment houses in the City of Boston and its suburbs, had originally been owned by Messrs. Gilbert, Coleman, and Levine, each owning a one-third interest, but subsequently Messrs. Coleman and Levine transferred one-half of their interest in this property to their wives, and, at the time of the petitioner's creation, Harry Coleman owned one-sixth interest in the property, Pauline Coleman one-sixth, Bernard Gilbert one-third, Harris Levine one-sixth, and Lena Levine one-sixth.

For the years 1927, 1928, and 1929 the petitioner filed returns with the Federal Government on Form 1041 reflecting the following incomes:

Year:	Income
1927	$81,302.11
19286	77,730.53
1929	23,376.23

The 1929 return, which is attached hereto and made a part hereof, is typical of the returns filed for all three years.

The trust owns and operates some twenty apartment houses in the City of Boston and its environs. The gross annual rents of these apartment houses amount to approximately $420,000. There are approximately 1,500 tenants in the apartment houses alto-
16 gether. The gross cost of the properties themselves is approximately $3,000,000. Employees' pay rolls total about $25,000 a year, the trustees draw no salary. The operating expenses run over $300,000 a year and are shown in detail in the returns which are made a part hereof. An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust. Two of the male trustees devote their entire time to the management and operation of the trust properties. A third trustee, Mr. Levine, is also actively engaged in taking care of a portion of the management duty. There are no building managers or superintendents, the trustees doing all this work as part of their duties as trustees. They supervise the maintenance of the trust properties and see that they are kept in operating condition, collect the rents, order repairs, purchase supplies, arrange loan financing, borrow money when necessary, pay all expenses, supervise the office details involved in the operation of these properties, personally direct the work of all the personnel, secure new tenants, pacify old ones, in short, they devote their entire time, energy, and ability to the successful operation of the trust properties. The female trustees are entirely inactive in the management of the trust. No part of the management work, collection of income, etc., is performed by "agents", as that term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents.

The trust indenture, mentioned in the first paragraph of the stipulation, after reciting the conveyance of the real estate to the five persons by deed of even date, declares that this real estate and any further property acquired under the trust, is and shall be upon the trusts, to the uses, for the purposes, and with the powers and limitations described in eight numbered paragraphs of the declaration of the trust. The second paragraph is as follows:

"SECOND. That the trust shall terminate in fifteen years (15) from the date hereof, unless sooner terminated by sale and distribution of the trust estate, or otherwise, as hereinafter provided."

The provisions of the third paragraph are that the trustees
17 shall hold the real estate, subject to other provisions of the declaration, in order to improve and dispose of it for the

benefit of the persons named as beneficiaries, in the shares thereinafter provided, and they shall have no interest or right in the trust property itself and no right to call for any partition hereof. "The interests of said beneficiaries shall be personal property carrying the rights hereinafter set forth. The death of any or all of the said beneficiaries during the continuance of this trust shall not determine the trust nor entitle his or her legal representative to an accounting by the trustees, nor to any suit or action at law or in equity against the trustees", but the successor of any beneficiary shall succeed to the rights of such decedent under the trust. The trustees were given certain powers in the fourth paragraph, including the power to invest and reinvest the trust property, including income, in mortgages and other obligations secured on real estate and in the purchase and improvement of real estate, to sell and convey the trust property or any part thereof on their own terms, to lease any part or all of the property for a term beyond the possible termination of the trust or any lesser term, to borrow money on such terms as they may see fit, and to execute all necessary contracts. The trustees were directed in the fifth paragraph to distribute any excess funds among the beneficiaries annually or oftener, if convenient. There is a provision in the sixth paragraph that the trustees shall have no power to bind the beneficiaries or the trustees personally but each trustee shall be responsible only for his own willful default and breach of trust. Resignation and replacement of trustees are provided for in the seventh paragraph.

The surviving trustees are to appoint successors, and upon their failure to do so the beneficiaries shall have the right to appoint a new trustee or trustees. The trustees are authorized in the eighth paragraph to terminate the trust at any time by sale of the trust property and division of the proceeds, and at the expiration of the term of fifteen years the trustees are directed to terminate the trust in that way. The trustees may alter and add to the declaration of trust but may not extend it beyond fifteen years. They may convey the trust fund to a new or other trustee or trustees, or to a corporation if they deem that advisable.

18 Bernard Gilbert was the only witness. He testified that he, Coleman, and Levine had been interested in the apartments for about twenty years prior to 1926, and they intend to continue to rent them for quite a long time; prior to 1926 the property was handled mostly by Gilbert, assisted by Coleman and with some little help from Levine, who was an elderly gentleman; after the trust was formed there was no change in the method of handling the property, there was no change in the books; the trustees held no meetings and kept no records of their proceedings; no shares or certificates were issued; the purpose of forming the trust was to prevent the possibility of the property being partitioned after the death of one of the owners; the provision of the trust deed empowering the trustees to purchase other property and develop it was inserted to pro-

tect the holdings that the trust already had; that power has never been exercised; and aside from real estate, the only property held by the trustees was 300 shares of Shawmut Associates purchased at the suggestion of the Shawmut Bank which held a mortgage on one of the trust properties. Section 704 of the Revenue Act of 1928 does not apply in this case.

Five persons had been associated together for many years in the business of owning and operating a large number of apartment houses. In the latter part of 1926, just prior to the first taxable year involved herein, they chose for their own purposes to put their properties in a trust of which they would be the original trustees and beneficiaries. It is not important to make a comparison between the form of this trust and the usual form of a corporation. The five persons were in a position to make the trust one way or the other. The trust was not engaged primarily in preserving, settling, liquidating, or winding up the trust estate and it was not acting as a passive holder of property or as a mere conduit to carry over profits to those entitled to them.

These trustees, although they did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise. Judged by its activities,
19 rather than by its potentialities, this trust is an association within the meaning of the applicable revenue acts. Edward Leszcynski, Trustee, 29 B. T. A. 551; Joseph E. Swanson et al., Trustees, 29 B. T. A. 1123; Ittleson v. Anderson, 67 Fed. (2d) 323; United States v. Neal, 28 Fed. (2d) 1022, cert. denied 278 U. S. 659; White v. Hornblower, 27 Fed. (2d) 777; Little Four Oil & Gas Co. v. Llewellyn, 35 Fed. (2d) 149; Commissioner v. Atherton, 50 Fed. (2d) 740; Trust No. 5833, Security-First National Bank v. Welch, 54 Fed. (2d) 323; certiorari denied 286 U. S. 544; Commissioner v. Morriss Realty Co., 68 Fed. (2d) 648; Twin Bell Oil Syndicate v. Commissioner, Fed. (2d) (April 12, 1934). Cf. Dunbar v. Commissioner, 65 Fed. (2d) 447.

The petitioner argues in its brief that it has no legal existence; the declaration of trust and the transfer of the property by the individuals to themselves as trustees was an empty gesture; and since it is not a trust under the laws of Massachusetts, it is not an association within the meaning of the revenue acts and, therefore, cannot be taxed as a corporation. The five interested parties certainly tried to create a trust. The income in question was earned in the name of the trust. The petition in this case was filed by and in the name of the trust. The trust has presented its evidence and briefed its case. If no trust exists, then the Board has no jurisdiction in this proceeding. The trust cannot exist for one purpose and be nonexistent for another. The Commissioner has cited some authorities to show that

this petitioner is in fact and in law a trust. But regardless of what it is under the laws of Massachusetts, Congress has seen fit to tax it as a corporation. Cf. *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U. S. 110.

Decision will be entered for the respondent.

Reviewed by the Board.

SMITH dissents.

20 Before U. S. Board of Tax Appeals

Decision

Entered June 4, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 1, 1934, it is

Ordered and decided: That there are deficiencies of $10,975.78 and $9,327.66 for the years 1927 and 1928, respectively.

J. E. MURDOCK, *Member.*

Before U. S. Board of Tax Appeals

Petition of Coleman-Gilbert Associates for review by the Circuit Court of Appeals of the First Circuit of decision by the United States Board of Tax Appeals filed June 4, 1934

Filed August 30, 1934

The petitioner in this cause by Ralph E. Tibbetts, counsel, hereby files its petition for a review by the Circuit Court of Appeals of the First Circuit of the decision by the United States Board of Tax Appeals entered on June 4, 1934, determining deficiencies in the petitioner's Federal income taxes for the calendar years 1927 and 1928 in the respective amounts of $10,975.78 and $9,327.66, and respectfully shows:

I

That the petitioner is located at Boston in the Commonwealth of Massachusetts and filed its tax reports for the years in question with the Collector of Internal Revenue for the Boston district.

II

NATURE OF CONTROVERSY

The controversy involves the determination of the petitioner's liability for Federal income taxes for the calendar years 1927 and 1928. For the said years 1927 and 1928 the petitioner filed reports on Form

1941 showing the entire net income as distributable and taxable to five individuals named as beneficiaries. The Commissioner contends that the petitioner should have filed a return as an association taxable under the provisions of the Internal Revenue Acts applicable to the years involved. The controversy is limited to the question as to whether the petitioner is to be treated as an association subject to taxation as such, or whether on the other hand it is not subject to taxation as an entity.

21

III

The said Coleman-Gilbert Associates being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Board, and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the First Circuit.

IV

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The ruling of the Board that "it is not important" to make a comparison between the form of organization of the petitioner and the usual form of a corporation.

2. The finding of the Board that the trustees of the petitioner were engaged in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purposes of carrying on a business enterprise.

3. The finding and ruling of the Board that the petitioner is an association within the meaning of the applicable Revenue Acts.

4. The ruling of the Board that the petitioner had no standing before the Board and the Board had no jurisdiction of the proceeding before it if the petitioner is, as it contends, neither a trust nor an association.

5. The ruling of the Board, that, irrespective of the status of the petitioner under the laws of Massachusetts, the petitioner is nevertheless taxable as a corporation under the enactments of Congress.

6. The finding of deficiencies for the years 1927 and 1928 in lieu of a determination that there is no income tax due from the petitioner for either of the years in controversy.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

22 [*Duly sworn to by Ralph E. Tibbetts; jurat omitted in printing.*]

Before U. S. Board of Tax Appeals

Statement of evidence

Filed September 27, 1934

The following is a statement of evidence submitted to the Board of Tax Appeals in the above-mentioned case:

The parties in the hearing before the Board stipulated the following facts:

The petitioner was created November 8, 1926, under an indenture of trust. A copy of this indenture is attached hereto and made a part hereof.

The creators of the trust, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine, named themselves trustees of the petitioner and deeded certain land which they had held to the petitioner.

The property in question consisting of some twenty apartment houses in the city of Boston and its suburbs had originally been owned by Messrs. Gilbert, Coleman, and Levine, each owning a one-third interest, but subsequently Messrs. Coleman and Levine transferred one-half of their interest in this property to their wives, and, at the time of the petitioner's creation, Harry Coleman owned one-sixth interest in the property, Pauline Coleman one-sixth, Bernard Gilbert one-third, Harris Levine one-sixth, and Lena Levine one-sixth.

23 For the years 1927, 1928, and 1929 the petitioner filed returns with the Federal Government on Form 1041 reflecting the following incomes:

Year:	Income
1927	$81,302.11
1928	77,730.53
1929	23,376.23

The trust owns and operates some twenty apartment houses in the city of Boston and its environs. The gross annual rents of these apartment houses amount to approximately $420,000. There are approximately 1,500 tenants in the apartment houses altogether. The gross cost of the properties themselves is approximately $3,000,000. Employees' pay rolls total about $25,000 a year, the trustees draw no salary. The operating expenses run over $300,000 a year. An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust. Two of the male trustees devote their entire time to the management and operation of the trust properties. A third trustee, Mr. Levine, is also actively engaged in taking care of a portion of the management duty.

There are no building managers or superintendents, the trustees doing all this work as part of their duties as trustees. They supervise the maintenance of the trust properties and see that they are kept in operating condition, collect the rents, order repairs, purchase supplies, arrange loan financing, borrow money when necessary, pay all expenses, supervise the office details involved in the operation of these properties, personally direct the work of all the personnel, secure new tenants, pacify old ones, in short, they devote their entire time, energy, and ability to the successful operation of the trust properties. The female trustees are entirely inactive in the management of the trust. No part of the management work, collection of income, etc., is performed by "agents", as that term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents.

Oral testimony was submitted by the petitioner by witness Bernard Gilbert, who testified that he was one of the trustees of the Coleman-Gilbert Associates; that he, together with Mr. Coleman and Mr. Levine, two of the other trustees, had been interested in the apartments which are now included, in the Coleman-Gilbert Asso-
24 ciates trust for about 20-odd years; that prior to 1926 the property had been operated under the name of Coleman & Gilbert and that the witness had been the most active in handling the property prior to the formation of Coleman-Gilbert Associates; that there was no change in the method of handling the properties after Coleman-Gilbert Associates was formed and no change in the books; that there were never any meetings of the trustees and no records of any proceedings of the trustees; that there were no shares or certificates of the trust issued at any time; that the purpose of forming Coleman-Gilbert Associates was to avoid a partition of the property by some of the heirs in case of the death of any of the owners of the property; that the reason the provision empowering the trustees to purchase other property was put in the trust instrument was simply to protect the holdings that the trust had; that the power had never been exercised; that the only securities the trust had were 300 shares of Shawmut Associates, a subsidiary of the National Shawmut Bank; that these securities were bought at the instance of the National Shawmut Bank which had a mortgage on the property of the trust, and suggested that the trust buy the shares in the Shawmut Associates; that these shares were left with the National Shawmut Bank after purchase.

On cross-examination by counsel for the Commissioner, the witness testified that there were times when the trust had to borrow substantial sums of money, which it endeavored to obtain at reasonable rates; that it was the endeavor of the trust to rent the apartment houses as profitably as possible with the idea of making a profit for the beneficiaries; that the employees of the trust comprising such as janitors, painters, carpenters, and the office employees involved ex-

penditures for salaries and wages of about $25,000 a year; that most of the tenants are without leases although some are on annual leases.

RALPH E. TIBBETTS,
Attorney for the Petitioner.

Assented to:
ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

25 Approved and ordered filed this twenty-seventh day of September 1934.

J. E. MURDOCK, *Member.*

Declaration of trust

[MEMORANDUM. The Declaration of Trust is here omitted as it is already printed at page 8. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Praecipe for transcript of record

Filed October 8, 1934

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the First Circuit at Boston, Massachusetts, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Petition for redetermination.

(b) Answer of the respondent.

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This Praecipe.

RALPH E. TIBBETTS,
Attorney for Petitioner.

26 [Clerk's Certificate to foregoing transcript omitted in printing.]

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, November 15, 1934, is here omitted. A. I. CHARRON, *Clerk.*]

27 [Caption omitted.]

Before U. S. Board of Tax Appeals

Docket No. 62960

COLEMAN-GILBERT ASSOCIATES, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances

For Petitioner: Ralph E. Tibbetts, Esq., Henry H. Bond, Esq.
For Respondent: C. A. Ray, Esq.

Docket entries

Transferred to Mr. Murdock 12/8/33.

1932

Mar. 18—Petition received and filed. Taxpayer notified. (Fee paid.)
Mar. 18—Copy of petition served on General Counsel.
Apr. 13—Answer filed by General Counsel.
Apr. 21—Copy of answer served on taxpayer—General Calendar.

28 1933

Apr. 3—Hearing set May 3, 1933.
Apr. 14—Motion for circuit hearing at Boston filed by taxpayer. 4/28/33 granted.
Apr. 26—Notice of appearance of Henry H. Bond as counsel filed.
June 7—Hearing set for week of July 10, 1933, at Boston, Mass.
July 13—Hearing had before Mr. Smith, Division 5. Submitted. Stipulation of facts filed. Briefs due 60 days from date. Called 7/10/33.
Aug. 7—Transcript of hearing of July 13, 1933, filed.
Sept. 2—Brief filed by taxpayer.

1934

June 1—Memorandum opinion rendered—Mr. Murdock, Division 3. Decision will be entered for Commissioner.
June 4—Decision entered—Division 3, Mr. Murdock.
Aug. 30—Petition for review by U. S. Circuit Court of Appeals, 1st Circuit, with assignments of error filed by taxpayer.
Sept. 1—Proof of service filed by taxpayer.
Sept. 26—Agreed statement of evidence lodged.
Sept. 27—Agreed statement of evidence approved and ordered filed.
Oct. 8—Praecipe filed.
Oct. 8—Proof of service filed.
Oct. 27—Order enlarging time to Nov. 15, 1934, for transmission and delivery of record entered.

Before U. S. Board of Tax Appeals

Petition

Filed March 18, 1932

IT:AR:B-3 CEO-60D

The above petitioner hereby petitions for a redetermination of deficiency set forth by the Commissioner of Internal Revenue in his notice of final determination dated January 20, 1932, and as a basis of this proceeding alleges as follows:

(1) The petitioner, Coleman-Gilbert Associates, is a trust organized by law and having its principal place of business in Boston, Mass.

29 (2) Notice of deficiency, a copy of which is attached and marked "Exhibit A" was mailed to the petitioner on January 20, 1932.

(3) The tax in controversy is the income tax for the calendar year 1929, and the amount of the alleged deficiency is $2,241.39.

(4) The determination of taxes set forth in said notice of deficiency is based upon the following errors:

(a) Said deficiency is not due under a proper construction of the Revenue Act of 1928 and Regulations relative thereto.

(b) The Commissioner has erred in taxing your petitioner as an association under said act, your petitioner being, if it exists at all, a Massachusetts trust, so-called, and not taxable under said act.

(c) The Commissioner has erred in taxing your petitioner as an association under said act for the further reason that by the execution of the trust instrument hereinafter referred to and attached hereto as "Exhibit B", the legal and equitable interests in certain real estate were vested in the same persons, and said interests, under the laws of the Commonwealth of Massachusetts, thereupon merged, thereby depriving your petitioner of all title in and to the property, the income of which is alleged to be the income of your petitioner.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Prior to November 5, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine were tenants-in-common of certain parcels of real estate located in the city of Boston. These properties were suitable for rental and were handled by the five individuals as a joint venture, being operated as a single unit in the nature of a partnership undertaking. The interest of Bernard Gilbert in the properties was two-sixths and that of each of the others above named was one-sixth.

(b) On November 5, 1926, the five individuals undertook to put the said properties into a trust by an instrument in writing, constituting themselves the "Coleman-Gilbert Associates", and taking legal title to such property into their own names as Trustees. Their respective beneficial interests in said properties remained as before,

and the so-called "trust" continued to conserve said properties, collect rents, and distribute the net proceeds in the same manner as before the formation of said trust, all net returns being divided among the trustees according to their respective beneficial interests, and the procedure of handling the properties after the formation of the trust was identical with that previously followed. The same books of account were kept continuously and the same character of entries made. None of the individuals before the formation of the trust or subsequent to it received any remuneration for services or were in any other way compensated other than to receive his or her respective share in the net proceeds.

(c) The trust instrument purported to limit the liability of the trustees to the trust property and by its terms precluded the possibility of any of the beneficial interests, who were also the trustees, from seeking a subdivision of the property under the provisions of the laws of the Commonwealth of Massachusetts, and it was for this purpose that the said trust was formed. No certificates of stock were issued to the beneficial owners. Certain provisions as to investment and reinvestment were inserted in the trust instrument as a precautionary measure, but were purely incidental and in aid of the conservation of the property originally put into the trust and as an aid to the liquidation of said property, and not with the idea and purpose of permitting the carrying on of a general real-estate business for speculative purposes or otherwise.

Wherefore your petitioner prays that this Board may hear the proceeding and determine that no deficiency exists for said year.

Respectfully submitted.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

Counsel signed in behalf of the majority of the trustees and in accordance with their wishes.

[*Duly sworn to by Bernard Gilbert, jurat omitted in printing.*]

NP–2–28

Exhibit A to petition

TREASURY DEPARTMENT,
Washington, Jan. 20, 1932.

COLEMAN AND GILBERT ASSOCIATES,
339 Huntington Avenue, Boston, Massachusetts.

SIRS: You are advised that the determination of your tax liability for the year 1929 discloses a deficiency of $2,241.39, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET, *Commissioner*,
By J. C. WILMER, *Deputy Commissioner*.

Enclosures: Statement, Form 882, Form 870.

32 STATEMENT

IT:AR:B-3 CEO-60D

In re: Coleman and Gilbert Associates, 339 Huntington Avenue, Boston, Massachusetts.

Tax liability

Year	Tax liability	Tax assessed	Deficiency
1929	$2,241.39	None	$2,241.39

Reference is made to the report of the internal-revenue agent in charge at Boston, Massachusetts, covering your income-tax liability for 1929 and to your protest filed under date of October 27, 1931.

The only point at issue is whether your organization is taxable as an association or whether the tax is to be paid by the beneficiaries upon their distributive share of the income accruing to you.

Under date of November 6, 1930, this office mailed you a deficiency notice with respect to your tax liability for 1927 and 1928, wherein it was held that your organization was taxable as an association. It appears that you have filed a petition with the United States Board of Tax Appeals contesting the decision of the Income Tax Unit. It is, therefore, deemed impracticable to afford you an opportunity to discuss your case in conference in this office, and accordingly this notice of deficiency is issued under the provisions of section 272 of the Revenue Act of 1928.

Net income reported on return	$23,376.23
Less: Credit	3,000.00
Taxable at 11%	20,376.23
Tax liability	2,241.39
Tax previously assessed	None
Deficiency in tax	2,241.39

Recital as to Exhibit B to petition

DECLARATION OF TRUST

[MEMORANDUM. The Declaration of Trust is here omitted, as it is already printed at page 8. A. I. CHARRON, *Clerk.*]

33 Before U. S. Board of Tax Appeals

Answer

Filed April 13, 1932

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled appeal, admits and denies as follows:

(1) Admits the petitioner, Coleman-Gilbert Associates, has its principal place of business in Boston, Massachusetts, and denies remaining allegations contained in paragraph (1) of the petition.

(2) Admits the allegations contained in paragraph (2) of the petition.

(3) Admits the taxes in controversy are income taxes for the calendar year 1929, but denies that the amount in controversy is $2,241.39.

(4) Denies that the respondent erred in the manner alleged in paragraph (4) of the petition, subparagraphs (a) to (c), inclusive.

(5) Denies the material allegations of fact contained in subparagraphs (a) to (c), inclusive, of paragraph 5 of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore it is prayed that the Board redetermine the amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner plus any additional amount which may arise from the correction of any error or errors that may have been committed by the Commissioner. Claim is hereby asserted for the increased deficiency, if any, resulting from such redetermination.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
C. A. RAY,
Special Attorney,
Bureau of Internal Revenue.

ike 4/11/32

34 *Recital as to memorandum opinion*

Entered June 1, 1934

[MEMORANDUM. The memorandum opinion is here omitted, as it is already printed at page 14. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Decision

Entered June 4, 1934

Pursuant to the determination of the Board, as set forth in its memorandum opinion entered June 1, 1934, it is

Ordered and decided: That there is a deficiency of $2,241.39 for the year 1929.

J. E. MURDOCK, *Member.*

Before U. S. Board of Tax Appeals

Petition of Coleman-Gilbert Associates for review by the Circuit Court of Appeals of the First Circuit of decision by the United States Board of Tax appeals filed June 4, 1934

Filed August 30, 1934

The petitioner in this cause, by Ralph E. Tibbetts, counsel, hereby files its petition for a review by the Circuit Court of Appeals of the First Circuit of the decision by the United States Board of Tax Appeals entered on June 4, 1934, determining deficiencies in the petitioner's Federal income tax for the calendar year 1929 in the amount of $2,241.39, and respectfully shows:

I

That the petitioner is located at Boston, in the Commonwealth of Massachusetts, and filed its tax report for the year in question with the Collector of Internal Revenue for the Boston District.

II

NATURE OF CONTROVERSY

The controversy involves the determination of the petitioner's liability for Federal income tax for the calendar year 1929. For
35 the said year 1929 the petitioner filed a report on Form 1041 showing the entire net income as distributable and taxable to five individuals named as beneficiaries. The Commissioner contends that the petitioner should have filed a return as an association taxable

under the provisions of the Internal Revenue Act applicable to the year involved. The controversy is limited to the question as to whether the petitioner is to be treated as an association subject to taxation as such or whether, on the other hand, it is not subject to taxation as an entity.

III

The said Coleman-Gilbert Associates, being aggrieved by the findings of fact and conclusions of law contained in said findings and opinion of the Board and by its decision entered pursuant thereto, desires to obtain a review thereof by the Circuit Court of Appeals for the First Circuit.

IV

ASSIGNMENTS OF ERROR

The petitioner assigns as error the following acts and omissions of the Board of Tax Appeals:

1. The ruling of the Board that "it is not important" to make a comparison between the form of organization of the petitioner and the usual form of a corporation.

2. The finding of the Board that the trustees of the petitioner were engaged in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purposes of carrying on a business enterprise.

3. The finding and ruling of the Board that the petitioner is an association within the meaning of the applicable Revenue Act.

4. The ruling of the Board that the petitioner had no standing before the Board and the Board had no jurisdiction of the proceeding before it if the petitioner is, as it contends, neither a trust nor an association.

5. The ruling of the Board that, irrespective of the status of the petitioner under the laws of Massachusetts, the petitioner is nevertheless taxable as a corporation under the enactments of Congress.

36 6. The finding of deficiency for the year 1929 in lieu of a determination that there is no income tax due from the petitioner for the year in controversy.

RALPH E. TIBBETTS,
Counsel for Petitioner,
10 Post Office Square, Boston, Mass.

[*Duly sworn to by Ralph E. Tibbets; jurat omitted in printing.*]

Recital as to statement of evidence

Filed September 27, 1934

[MEMORANDUM. The Statement of Evidence with the Declaration of Trust attached thereto is here omitted as it is already printed at page 22. A. I. CHARRON, *Clerk.*]

Before U. S. Board of Tax Appeals

Praecipe for transcript of record

Filed October 8, 1934

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and certify and transmit to the Clerk of the United States Court of Appeals for the First Circuit at Boston, Massachusetts, with reference to petition for review heretofore filed by the petitioner in the above cause, a transcript of the record in the above cause, prepared and transmitted as
37 required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

(1) The docket entries of all proceedings before the Board of Tax Appeals.

(2) Pleadings before the Board of Tax Appeals, as follows:

(a) Motion to file amended petition for redetermination (no record).

(b) Amended petition (no record).

(c) Respondent's answer to original petition.

(3) The memorandum opinion of the Board of Tax Appeals.

(4) The decision of the Board.

(5) The petition for review, filed by the petitioner in the above cause.

(6) The statement of evidence.

(7) This praecipe.

Ralph E. Tibbetts,
Attorney for Petitioner.

[Clerk's certificate to foregoing transcript omitted in printing.]

[Memorandum. An order or enlargement of time for docketing case to, and including, November 15, 1934, is here omitted. A. I. Charron, *Clerk.*]

38 In United States Court Court of Appeals, First Circuit

Minute entry

On January 4, 1935, these cases came on to be heard together, and were fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

39 In United States Circuit Court of Appeals for the First Circuit

No. 2975. October term, 1934

COLEMAN-GILBERT ASSOCIATES, PETITIONER FOR REVIEW

v.

COMMISSIONER OF INTERNAL REVENUE

No. 2976

SAME

v.

SAME

Appeals from Board of Tax Appeals

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

Filed February 27, 1935

WILSON, *J:* These are petitions for review of decisions of the Board of Tax Appeals under secs. 1001–1003 of the 1926 Revenue Act as amended by sec. 603 of the 1928 act and sec. 1101 of the Revenue Act of 1932. The petition in #2975 involves income taxes for the years 1927 and 1928, and the petition in #2976 involves income taxes for the year 1929. The same question is involved in both cases and may be disposed of in one opinion.

The question to be determined is whether the trust known as Coleman-Gilbert Associates for the years in question is taxable as a corporation.

By a declaration of trust executed on November 8, 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine provided that certain real estate situated in the city of Boston and its suburbs should, for a period of fifteen years, be held by them in trust, under the name, Coleman-Gilbert Associates.

It is agreed by the parties hereto that the property in question, consisting of some twenty apartment houses in the city of Boston and its suburbs, had originally been owned by Messrs. Gilbert, Coleman, and Levine in common, each owning a one-third interest;
40 that prior to November 6, 1926, Coleman and Levine had each transferred one-half of his interest in this property to his wife, so that, at the time of the declaration of trust, Harry Coleman owned one-sixth interest in the property, his wife, Pauline Coleman, one-sixth; Harris Levine, one-sixth; his wife, Lena Levine, one-sixth; and Bernard Gilbert, one-third; that for the years 1927, 1928,

and 1929 the petitioner filed returns with the Federal Government as a fiduciary on form 1041 reflecting the following incomes: For the year 1927, $81,302.11; for the year 1928, $77,730.53; and for the year 1929, $23,376.23, each beneficiary in each year filing a return for his or her share of the income distributed under the trust agreement.

It is further agreed that altogether there are about 1,500 tenants in the apartment houses, and the gross annual rentals amount to approximately $420,000; that the operating expenses are over $300,000 a year; that two of the male trustees devote their entire time to the management and operation of the trust properties, and a third trustee, Mr. Levine, is also actively engaged in taking care of a part of the management duties, but so far the female trustees have been entirely inactive in the management of the trust property; that the trustees draw no salary; that the male trustees have superintended the maintenance of the trust properties, including the collection of the rents, the making of repairs, the purchasing of supplies, the borrowing of money when necessary, the paying of all bills, and supervising the office details involved in the operation of these properties; that no part of the management work, collection of income, has been performed by "agents" as the term is generally understood, except insofar as strictly supervised employees on a weekly salary might be considered agents. The only other property in the trust estate are 300 shares of the Shawmut Associates, a subsidiary of the National Shawmut Bank, which were bought at the instance of the National Shawmut Bank, which has a mortgage on the property of the trust.

Bernard Gilbert testified before the Board without contradiction that, for more than twenty years, he, together with Mr. Coleman and Mr. Levine, had been interested in this real estate, which is now included in the Coleman-Gilbert Associates trust; that prior to 1926 the property had been operated under the name of Coleman & Gilbert, and that he had been the most active of the coowners in the handling of the property prior to the formation of the Coleman-Gilbert Associates; that there was no change in the method of handling the properties after Coleman-Gilbert Associates was formed, except as hereafter appears, and no change in the books; that there were never any meetings of the trustees, and no records of their proceedings kept; that there were no shares or certificates of the trust issued at any time; and of course no meetings of shareholders as such were ever held; that the purpose of forming Coleman-Gilbert Associates was to avoid a partition of the property by some of the heirs in case of the death of any of the owners of the property, and, in any event, was to terminate in fifteen years; that the power to purchase
41 other property was inserted in the trust instrument simply to protect the holdings that the trust had; but this power and certain other broad powers vested in the trustees had never been exercised.

Congress has not undertaken to lay down any tests for determining whether an organization is an association within the meaning of sec. 2 (a) (2) of the Revenue Act of 1926 and sec. 701 (a) (2) of

the Revenue Act of 1928, and taxable as a corporation. It has merely said by way of definition that corporations "include associations, joint-stock companies, and insurance companies."

It was left for the courts or the Treasury Department by regulations to determine what organizations are included within the term "associations." As yet the Supreme Court has not laid down any absolute test. Two cases only have come before it in which the taxing of trusts as associations was involved: Crocker et al., Trustees, v. Malley, 249 U. S. 223; Hecht et al., Trustees, v. Malley, 265 U. S. 144.

In the former case, decided in 1919, the court in deciding that the trust was not an association, laid stress on two points: (1) That the purpose of the trust was to liquidate a business, and (2) that the beneficiaries had no control over the trustees.

In the case of Hecht et al., Trustees, v. Malley, the court said, p. 157:

"The word 'association' appears to be used in the act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.' 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3rd Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and Allen v. Stevens (App. Div.), 54 N. Y. S. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: 'In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation.'"

In the same case the court said, p. 161:

"It results that Crocker v. Malley is not an authority for the broad proposition that under an act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an 'association' within the meaning of its provisions.

"We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the act of 1918."

This appears to be the last word of the Supreme Court that is helpful in determining what is included in the term "association."

42 The Treasury Department has endeavored from time to time to clarify the situation by regulations defining associations and trusts. Under art. 1504 of Regulation 62, it followed what it understood was the holding of the court in Crocker v. Malley, supra, and provided that—

"where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among trustees and of consenting to a modification of the terms of the trust, no association exists. * * * If, however, the cestuis qui trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association. * * *"

In 1926, following the decision in the Hecht v. Malley case, by Regulation 69, arts. 1502 and 1504, and again in 1928 by Regulations 74, arts. 1312 and 1314, it was provided that, in addition to the above tests in Regulation 62, "if, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists. * * * Even in the absence of control by the beneficiaries where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors of a corporation for the purpose of carrying some business enterprise, the trust is an association within the meaning of the statute."

There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. In some instances the courts have based their decisions on the rule that where the administrative board has construed an ambiguous or indefinite definition in a statute and no change was made in a later act of Congress, it is presumed that Congress had adopted the definition adopted by the administrative board; in other cases the courts have been influenced by other considerations: the limited activities of the trustees, and the purpose of the trust. In any event, the decisions are seemingly in a hopeless state of confusion. Kleines Federal Income Taxation, p. 1138, para. 34:9, and 1933 Suppl., para. 34:9. As the regulations of the Treasury Department have been modified from time to time, it may well be questioned whether Congress has intentionally adopted every modification of the regulations when it makes no change in the language of its acts; or whether it has left it for further construction by the courts, especially if the regulations have not followed closely the language of the courts. Tyson et al. v. Commissioner, 68 Fed. (2d) 584; Trust No. 5833, Security-First Nat. Bank of Los Angeles v. Welch, 54 Fed. (2d) 323, 326.

It would serve no useful purpose to attempt to analyze all the cases that have been decided by the Board of Tax Appeals and the Circuit Courts of Appeals involving this question. The lack
43 of a conclusive test will sufficiently appear in the following cases in which the Board of Tax Appeals has been sustained in holding a trust was an association: Willis et al. v. Commissioner, 58

Fed. (2d) 121; Smith v. Commissioner, 69 Fed. (2d) 911; Little Four Oil & Gas Co. v. Llewellyn, 35 Fed. (2d) 149; Trust No. 5833, Security-First Nat. Bank of Los Angeles v. Welch, supra; Sloan et al. v. Commissioner, 63 Fed. (2d) 667; Investment Trust of Mutual Investment Co., Empire Trust Co., Trustee, v. Commissioner, 71 Fed. (2d) 1009; and in the following cases in which the court has either reversed the Board in holding that the trust was an association or has approved the Board's finding that the trust was not an association, Lansdowne Realty Trust v. Commissioner, 50 Fed. (2d) 56; Lucas, Commissioner, v. Extension Oil Co., 47 Fed. (2d) 65; Commissioner v. Morriss Realty Co. Trust, 68 Fed. (2d) 648; Commissioner v. Pryor & Lockhart Development Co., 70 Fed. (2d) 154, 158; Commissioner v. Kelley et al., Trustees (decided Dec. 4, 1934 (C. C. A.)).

From the decisions of the Board of Tax Appeals and the several Circuit Courts of Appeals, it is impossible to mark out any definite pathway to follow in every case. The only conclusion is that each case must depend on its own state of facts.

We think, however, it is generally agreed that, in order for a trust to be taxed as a corporation, the trustees must not only be carrying on a business enterprise for profit but must be doing it in much the same manner and form as directors of a corporation. One other factor also seems to be agreed upon: that it is not what the trustees are authorized to do under the trust instrument but what they actually are doing. Gardiner v. United States, 49 Fed. (2d) 992; Commissioner v. Pryor & Lockhart Development Co., supra.

It also appears that the purpose for which the trust was formed is given weight in determining the nature of the organization. Was it organized solely for the purpose of conducting a business for profit, or merely to collect and distribute income and eventually liquidate the corpus of the trust, Willis et al. v. Commissioner, 58 Fed. (2d) 121, 122; Commissioner v. Atherton et al., 50 Fed. (2d) 740; or is it a trust under which the conduct of a business for the benefit of the cestuis qui trustent is incidental to the purpose for which it was created, as in Commissioner v. Kelley et al., supra?

It was held in Commissioner v. Pryor & Lockhart Development Co., supra:

"Where an entity of this kind resembles a corporation in some respects and that of a partnership in others—that frequently being the case—the features of similarity should be compared and the marks of dissimilarity contrasted. The resemblances should be balanced. It should be determined by that method the one to which the enterprise is predominantly akin in the method, mode, and form of procedure in the conduct of its business. If it be a corporation, it falls within that category; if a partnership, it should be placed in that class and should be taxed accordingly. Tyson v. Commissioner, supra. In Lucas, Commissioner, v. Extension Oil Co.
44 (C. C. A.), 47 F. (2d) 65, 67, involving facts similar to those presented here, the court declared the applicable doctrine as follows:

"'The Board of Tax Appeals in a careful opinion, balancing the resemblances which petitioner in its structure more to a trust against those which it bore to a corporation, and considering also the facts as to what the petitioner actually did, found as a fact and concluded as a matter of law that petitioner was not an association within the meaning of the taxing act, "voluntarily organized to transact business under corporate forms and transacting such business".'"

It is true that the Board of Tax Appeals found as facts that, while the trustees in the instant cases did not exercise all the powers given them in the trust instrument, they were, nevertheless, carrying on a business for profit in much the same manner as directors of a corporation are associated together with the purpose of carrying on a business enterprise; and upon these facts, judged by their activities, the Coleman-Gilbert Associates was an association within the meaning of sec. 2 (2) (a) (2) of the 1926 act and 701 (a) (2) of the 1928 act.

The three active members of the trustees were undoubtedly conducting the management of the trust property with a view to ensuring an income for the beneficiaries of the trust, who were the equitable if not the legal owners of the res; but it does not appear that they exercised any powers that they were not bound to exercise by reason of their ordinary duties as trustees in preserving the properties under a pure trust, viz: keeping them in repair, renting them to the best advantage, and collecting the rentals, and paying operating expenses. In other words, they did nothing that they were not bound to do in their capacity as trustees, if the trust was what may be termed a pure trust, in which the trustees were expressly authorized to borrow money, if necessary, for carrying out the purpose of the trust.

From the activities of the trustees alone we do not think the Board was warranted in holding as a matter of law that the trust was an association. While there may have been sufficient evidence to warrant the Board in finding that they were conducting a business enterprise, and with the purpose of ensuring an income for the beneficiaries during the continuance of the trust, and while they may have exercised powers in some respects as great as those of the directors of a corporation, they did not exercise them in the manner of directors of a corporation. They held no meetings; they kept no records; their acts were not determined by a majority vote. Their tenure as trustees was during life or the duration of the trust, unless they voluntarily resigned. Two trustees were wholly inactive, and a third only active in part in the management. They conducted the business in the same manner that it had been conducted before the trust was formed.

In a case not clearly falling on one side or the other of the line between an association and a trust, we think the Board in comparing the resemblance of a trust to a corporation should give due weight to the purpose for which the trust was organized. The uncontradicted evidence in these cases discloses, we think, that the Coleman-Gilbert Association was not organized to conduct

a business for profit; that while the trustees did manage the property so that it produced an income for the beneficiaries, it was only incidental to the main purpose for which the trust was created. The purpose of the creators, according to the uncontradicted evidence, was to prevent a partition and division of the property in case one of the owners died within a definite period of time. It was deemed in the interest of the coowners and their heirs that the properties should be kept intact for a period of fifteen years. There is no evidence to warrant any inference that it was organized in order that it might be better managed, or that any additional financial advantage would accrue from creating a trust. If every trust terminating in five, ten, or fifteen years in which the trust res consisted of rentable real estate is managed faithfully and prudently by the trustees with a view to producing the largest income for the cestuis qui trustent is to be taxed as an association, few strictly pure trusts would escape a double taxation upon its income.

The imposition of a double tax upon the income of a trust, viz: a tax, first, on the income of the trust as an entity, and a further tax upon the distributive shares of the beneficiaries should clearly be warranted under the acts of Congress, and should not have as its basis some remote resemblance to a corporation. If there is doubt, it should be resolved in favor of the taxpayer. Crocker v. Malley, supra, p. 233; Hecht v. Malley, p. 160. To warrant a tax as a corporation, we think that not only should the trustees be actively conducting a business chiefly for profit and in the form and manner of directors of a corporation, but where there is doubt, it should not be determined wholly by a resemblance in form, but the nature and purpose of the trust agreement should be considered in determining whether a trust is an association within the intent of Congress. Congress evidently sought to prevent trusts similar to those known as Massachusetts Trusts, which may be organized for the sole purpose of conducting a business for profit, and have many of the features of a corporation, from avoiding the capital stock tax and corporation income taxes; but we do not think the purpose of Congress in defining a corporation as including associations was to impose a double tax on the income of a trust of limited duration, organized not for the conduct of a business for profit, but to keep the trust res intact in the respective families of the trustees during the period of the trust instrument, the trust property formerly having been owned by the trustees as cotenants, especially when no change in its management results from that when owned as cotenants.

There is no evidence in this case that the trustees in their management, even if they had the necessary powers, departed from the purpose for which the trust was organized. The conclusion which the Board drew from the stipulated facts and the uncontradicted evidence that Coleman-Gilbert Associates was an association within the

meaning of the Revenue Acts of 1926 and 1928, we think, was error.

46 The decisions of the Board of Tax Appeals are reversed, and the cases are remanded to that Board for further proceedings not inconsistent with this opinion.

On the same date, to wit, February 27, 1935, the following final decree was entered in each case:

In United States Circuit Court of Appeals

Final decree

February 27, 1935

This cause came on to be heard January 4, 1935, upon the record upon petition for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, February 27, 1935, here ordered, adjudged, and decreed as follows: The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court:

ARTHUR I. CHARRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on March 30, 1935, mandate issued to the Board of Tax Appeals.

[Clerk's certificate to foregoing transcript omitted in printing.]

47 Supreme Court of the United States

No. 78. October Term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

48 Supreme Court of the United States

No. 79. October Term, 1935

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 39631, 39632. U. S. Circuit Court of Appeals, First Circuit. Term No. 78. Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Coleman-Gilbert Associates. Term No. 79 Guy T. Helvering, Commissioner of Internal Revenue, petitioner, vs. Coleman-Gilbert Associates. Petition for writs of certiorari and exhibit thereto. Filed May 27, 1935. File Nos. 78 O. T. 1935, 79 O. T. 1935.

FILE COPY

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No. [redacted] 79

In the Supreme Court of the United States

OCTOBER TERM, 1934

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLEMAN-GILBERT ASSOCIATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, petitioner

v.

COLEMAN-GILBERT ASSOCIATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above cause on February 27, 1935.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 14–19) is unreported. The opinion Circuit entered in the above cause on February 27, of the Circuit Court of Appeals is reported in 76 F. (2d) 191.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 27, 1935. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Coleman-Gilbert Associates is an association or a trust.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved appear in Appendix A, infra, pp. 7–9.

STATEMENT

The petitioner was created November 8, 1926, under an indenture of trust. (R. 15.) The creators of the trust (Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine) deeded to themselves as trustees various items of property. (R. 8, 15.)

During the years in question (1927, 1928, 1929) the trust owned and operated some twenty apartment houses, the annual gross rents amounting to about $420,000. (R. 15.) While the trustees themselves drew no salaries, the employees' pay roll totaled about $25,000 per year. (R. 16.) The annual operating expenses were over $300,000. (R. 16.)

The female trustees were inactive in the trust, but the three male trustees took active parts in the management. One of the latter was actively engaged as to a portion of the trust, while the other two devoted their entire time to the whole trust.

(R. 16.) An office of three persons, besides the three operating trustees, was required to maintain the necessary financial records. (R. 16.)

The operating trustees supervised the maintenance of the trust properties, performing the functions of building managers and superintendents. They collected rents, provided for repairs, purchased supplies, arranged loan financing, paid general expenses, and supervised the office details. (R. 16.) There were times when it was necessary to borrow substantial sums of money which they endeavored to obtain at reasonable rates. (R. 24.) They personally directed the work of the employees, obtained new tenants, pacified old ones, and devoted "their entire time, energy and ability to the successful operation of the trust properties". (R. 16.)

The Board of Tax Appeals found as a fact that the trustees were carrying on a business and that (R. 18):

> * * * although they [trustees] did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in *much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise.* (Italics supplied.)

While no certificates were issued to the beneficiaries, there was, nevertheless, no prohibition against assigning their interests. Nor was there

any provision preventing them as beneficiaries from directing and controlling themselves as trustees in the performance of the trust's activities. Although the trustees held no meetings and therefore could keep no records of such proceedings, yet they must have kept rather elaborate books, as is evidenced by the finding of the Board that (R. 16):

> An office force of three persons, besides the three operating trustees, is required to keep the necessary financial records of the trust.

The trust indenture provided that the beneficiaries were to have no interest in the trust property itself, and that the interests of the beneficiaries were to be personal property. Provision was made for the distribution of profits by the trustees annually, or oftener if convenient. A further provision sought to relieve the beneficiaries of any personal liability. (R. 17.)

The Commissioner determined that the petitioner, in quasi-corporate form, was actively engaged in the conduct of a business enterprise (R. 6–7), and, therefore, taxable as an association. The Board of Tax Appeals upheld this determination, but was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in reversing the determination of the Board of Tax Appeals that Coleman-Gilbert Associates is an association.

REASONS FOR GRANTING THE WRIT

1. In deciding this case the court below recognized the hopeless confusion existing among the decided cases on this issue, saying:

> There are numerous decisions of the Board of Tax Appeals and Circuit Courts of Appeals in review, without laying down any definite line of demarkation between an association and a pure trust. In some instances the courts have based their decisions on the rule that where the administrative board has construed an ambiguous or indefinite definition in a statute and no change was made in a later Act of Congress, it is presumed that Congress had adopted the definition adopted by the administrative board; in other cases the courts have been influenced by other considerations: the limited activities of the trustees, and the purpose of the trust. In any event, *the decisions are seemingly in a hopeless state of confusion.* (Italics supplied.)

In the light of such confusion,[1] the question involved is one of general importance, since there are numerous cases now in litigation and in the Bureau of Internal Revenue involving the taxability of

[1] Some of the existing confusion may perhaps be due to the fact that most cases raising this issue are *income* tax cases, while *Hecht* v. *Malley*, 265 U. S. 144, regarded by many as the leading case, involved an excise tax on *doing business*. It may be, therefore, that the degree of activity on the part of the trustees need not be as great in the income tax cases in order to tax the organization as an association.

trusts as corporations. Presumably aware of the importance of the issue, this Court on May 13, 1935, granted a petition for certiorari in *Morrissey* v. *Helvering*, 1934 Term, No. 834, which was based in part upon a conflict with the decision in the instant case.

2. The decision below is in substantial conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Swanson* v. *Commissioner*, decided April 10, 1935, not yet reported, but printed in full as Appendix B to this petition.

Therefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

MAY 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 2. (a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

(U. S. C. App., Title 26, Sec. 1262.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 878, 880:

SEC. 701 (a) (2) is identical with Section 2 (a) (2) of the Revenue Act of 1926, *supra*.

SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

* * * * *

(b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

Regulations 69, promulgated under the Revenue Act of 1926:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2.

ART. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even

in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

Regulations 74, promulgated under the Revenue Act of 1928:

Articles 1312 and 1314 are substantially the same as Articles 1502 and 1504 of Regulations 69, *supra*.

APPENDIX B

In the United States Circuit Court of Appeals for the Seventh Circuit

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No. 5280. October Term, 1934, April Session, 1935

JOSEPH E. SWANSON, ET AL., TRUSTEES OF THE LAKE VIEW LAND ASSOCIATION, petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decisions of the United States Board of Tax Appeals

---

April 10, 1935

Before EVANS, SPARKS, and FITZHENRY, *Circuit Judges.*

FITZHENRY, *Circuit Judge.* This is a petition for review of decisions of the United States Board of Tax Appeals affirming the decision of the Commissioner of Internal Revenue that deficiencies of income tax were due from the Lake View Land Association. The Board found that the case is substantially the same as that of *Joseph E. Swanson, et al., Trustees of the Fullerton Parkway Land Trust,* 29 B. T. A. 1123, and is governed by the decision in that case. The only issue on this review is whether the income of the Lake View Land Asso-

ciation for the years 1925 and 1926 is subject to tax as the income of a trust under Section 219 of the Revenue Act of 1926 or as an "association" under Section 2 (a) (2) of that Act.

Joseph E. Swanson and Ralph C. Otis were the owners of a three-story apartment building containing nine apartments. On June 1, 1915, they entered into a trust agreement for the purpose of carrying the title to the real estate. The first trustees were Ralph C. Otis, Joseph E. Swanson, and Allen G. Mills. In 1926, James Otis succeeded his father as trustee.

Under the trust agreement, the trustees were given the complete management and control of the property, to exchange, reconstruct, remodel, sell or improve at their discretion or to borrow money secured by the property. They were authorized to rent suitable quarters for the transaction of the business of the trust and employ such assistants as they required.

The agreement provided for the issuance of "receipts" to evidence the interests of the beneficiaries, representing 1,000 shares at the par value of $100 each. It was provided that the receipts were evidences of the ownership of personal property and not real estate. They might be transferred by assignment. Originally, one-half of the shares were issued to Otis and one-half to Swanson, who later transferred their interests to their wives, who owned the shares during 1925 and 1926. The agreement provided that the trust could sue and be sued; that neither the trustees nor the beneficiaries should be personally liable and that all persons dealing with the trustees must look only to the property of the trust; that it should be terminated at the expi-

ration of twenty years after the death of the last survivor of certain named persons or by the trustees in their discretion at any time before the expiration of the twenty years by selling all the property held by them as such and distributing the net proceeds of such sale. The trust had succession and was not terminated by the death of a trustee or beneficiary.

The case differs from that of Joseph E. Swanson, *et al,* Trustees of the Fullerton Parkway Land Trust in that the Lake View Land Association acquired a complete building, whereas, the Fullerton Parkway Land Trust purchased a piece of vacant property and erected the building upon it.

The trustees of the Lake View Land Association never assembled in formal meetings, never adopted resolutions or took formal action with reference to the affairs of the property, kept no minute book, had no bylaws. They elected no officers and no so-called board of directors.

From the above analysis of the agreement which created Lake View Land Association, the conclusion is inescapable that it was a corporation in everything but the name and seal and the fact that its business was carried on without holding formal meetings, adopting resolutions, and keeping minutes. A group cannot organize and carry on business and escape taxation as a corporation on so slight a distinction.

In *Tyson* (*Chicago Real Estate Trust*) v. *Commissioner,* 68 F. (2d) 584, 587, this Court said:

> That the organization of the trustees was of a very loose and informal character we think is not sufficient to take them out of the classification contemplated by the adminis-

> trative regulations cited. Even though no formal meetings of the trustees were held, they had adopted a regular practice for the administration of their trust. * * *. It is true that neither the trustees nor the receipt holders ever drew up a code of rules or by-laws for the government of the trust, but such action seems entirely unnecessary in view of the comprehensive nature of the trust agreement under which they were organized in the first place. We think these facts are sufficient to warrant our classifying petitioners as a quasi-corporate organization in form and procedure and as such taxable as a corporation.

Petitioners contend that they were not carrying on a business enterprise but were merely serving to hold the title to the real estate. It is true that the active management of the property seems to have been left to Joseph E. Swanson, one of the trustees who was also a member of a real estate firm known as Willoughby & Company. Ralph C. Otis had his office in the same building and frequently consulted with Swanson in regard to the management of the trust company. The question therefore resolves itself into this: Can the trustees avoid the conclusion that they are carrying on a business enterprise by turning the management of their affairs over to one of their number as a partner in another enterprise which handles the affairs of the association with the advice of the other trustees? We believe the answer to be that the trustees in this case were an association carrying on a business enterprise, personally and through their agents and employees.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 78, 79

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLEMAN-GILBERT ASSOCIATES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 11–15) is unreported. The opinion of the Circuit Court of Appeals (R. 28–35) is reported in 76 F. (2d) 191.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in each case February 27, 1935. (R. 35.) A petition for writs of certiorari was filed

May 27, 1935, and was granted October 14, 1935. (R. 35.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust involved is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926 and Section 701 (a) (2) of the Revenue Act of 1928.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set out in the Appendix, *infra*, pp. 27–40.

STATEMENT

The facts in this case are not in dispute. The following facts are taken from the memorandum opinion of the Board and from the trust instrument.

In 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine and Lena Levine were co-owners of certain real estate consisting of about twenty apartment houses in Boston, Massachusetts. The property had originally been owned by Harry Coleman, Harris Levine and Bernard Gilbert in equal shares, but the first two had given their wives one-half of their interests. The three men had been associated together for many years in the operation and management of apartment houses. (R. 11, 13.)

On November 8, 1926, these five individuals executed a declaration of trust with respect to this property, naming themselves as trustees and designating the trust as the "Coleman-Gilbert Associates." (R. 6.)

The trustees were directed to hold this real estate and any other real estate acquired in trust to improve and dispose of it for the benefit of the settlors and their representatives and assigns, devisees or legatees. They were given express authority to acquire and sell other real property situated in Massachusetts, and to invest the trust property, including income, in such property or in notes or other obligations secured by real estate as they might select. They were also given the power to enter into any leases or agreements concerning the trust property and to borrow money and give mortgages. (R. 6–7.)

Whenever the trustees in their judgment had more funds than were required for development and improvement of the trust property and expenses (whether such funds were derived from sales or net income), they were directed to distribute the excess among the five settlors in proportion to the interests they had held in the property. (R. 7–8.)

It was provided that the *cestui que trustent* should have no interest in the trust property itself and no right to partition but that their interests should be personal property, which should pass as

such upon their deaths to their representatives, legatees or assigns without terminating the trust. (R. 6.)

The trust was to last for fifteen years, except that the trustees might terminate it before that time by a sale of the trust estate and division of the proceeds among the *cestui que trustent*. The trustees could amend the trust except that they could not extend its duration. They could also appoint a successor trustee, and if they failed to do so, the beneficiaries might do so. (R. 6, 7–8.)

The beneficiaries were not to be obligated by the trustees and the trustees were not to be personally liable for trust obligations except for breach of trust or wilful default. Persons dealing with the trust were to look only to the funds and property of the trust for payment. (R. 8.)

The gross cost of the apartments owned by the trust was $3,000,000, the gross rents about $420,000 a year, the operating expenses $300,000 a year including an employee's pay roll of $25,000 a year. Two of the trustees, Mr. Coleman and Mr. Gilbert, devoted their entire time to the management and Mr. Levine devoted a portion of his time thereto. They were assisted by an office force of three persons, but had no building managers or superintendents, and supervised the maintenance of the properties and repairs, collected rents and secured tenants, purchased supplies, effected the necessary financing and paid expenses. (R. 12.)

The trustees did not acquire any additional property except 300 shares of Shawmut Associates, purchased at the suggestion of the Shawmut Bank, which held a mortgage on one of the trust properties. (R. 14.)

The trust filed returns on Form 1041 (a fiduciary return) for the years 1927, 1928 and 1929. (R. 12.) The Commissioner held that the trust was an association and determined deficiencies of $10,975.78, $9,327.66 and $2,241.39, respectively. (R. 11.) The Board sustained the Commissioner's determination but on appeal to the Circuit Court of Appeals, the decision of the Board was reversed.

SUMMARY OF ARGUMENT

I

The trust here involved owned and operated twenty apartment houses in Boston and the trustees had authority to make additional investments in real estate and securities. Two of the five trustees devoted their entire time and a third devoted part of his time to developing, improving and managing the properties. The properties held in trust cost $3,000,000, contained 1,500 tenants, produced gross rentals of $420,000 a year and required an annual pay roll of $25,000 (exclusive of trustees' compensation). These facts support the Board's determination that the trust was doing business and its determination on that issue should have been deemed conclusive in the court below. But

even if the question whether it was doing business should be regarded as a mixed question of fact and law, the Board's conclusion was supported by many decisions of this and other courts in cases involving similar facts.

On no theory can it be regarded as a trust for conservation or liquidation. The fact that the five individuals who created it might not have done so if they had not wanted to avoid a partition of the property does not prove otherwise. That was the occasion for the agreement, but the purpose was to make a profit.

II

The satisfaction of the doing-business test should have been considered sufficient to classify the trust as an association, without regard to whether or not it employed certificates of stock, seals and other devices of a corporation. This is the view of several of the Circuit Courts of Appeals and it is supported by the reasoning of this Court and the actual facts in the leading case on the subject.

The regulations of the Treasury Department, at least since 1919, have not required that a trust have external resemblances to a corporation in order to be classified as an association but have emphasized the doing-business test. Prior to that time at one period the regulations provided that there should be certificates of beneficial interest, but the requirement was done away with in later regulations. While these regulations are not in

all respects complete, they emphasize the doing-business test.

That the trusts which are to be taxed as individuals under Section 219 of the Revenue Act of 1926 and Sections 161 and 162 of the Revenue Act of 1928 are trusts for conservation and not others, is indicated by the fact that trusts for infants and unborn children are specifically mentioned. Moreover, in assimilating associations to corporations rather than individuals, Congress must have had in mind the substantial resemblances between corporations and associations and not mere matters of form.

The elements which distinguish a business conducted by a corporation from one conducted by an individual are the continuity of the business without interruption by death or the transfer of interests, a centralized management and an absence of personal liability. All of these elements were present in this case. The interests of the beneficiaries could be alienated, even though they were not represented by certificates of interest, and the trust was to continue regardless of changes in the beneficial interests. Neither the beneficiaries nor the trustees were personally liable for any obligations of the trust. The management of the enterprise was in the trustees, who were to act for whatever persons held the beneficial interests. The trust should have been classified as an association for this reason.

We think that it is settled that beneficiary control is no longer important, but if the Court should hold otherwise, we wish to point out that the five beneficiaries were the five trustees and hence exercised control. The fact that the five individuals did not exercise control in their capacity as beneficiaries but in their capacity as trustees is not important. From a practical point of view, they exercised control and that is all that should be required to treat the trust as an association.

ARGUMENT

THE COLEMAN-GILBERT ASSOCIATES IS AN ASSOCIATION WITHIN THE MEANING OF SECTION (2) (A) (2) OF THE REVENUE ACT OF 1926 AND SECTION 701 (A) (2) OF THE REVENUE ACT OF 1928

The sole question presented is whether the Coleman-Gilbert Associates is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926, *infra,* and Section 701 (a) (2) of the Revenue Act of 1928, *infra,* and hence is to be taxed as a corporation, or is a pure trust which, by virtue of Sections 219 and 161 and 162 of those Acts, is to be taxed as an individual.

The same question is involved in the cases of *T. A. Morrissey and James M. O'Brien, Trustees, etc.* v. *Helvering,* No. 17, October Term, 1935, which has been argued, *Joseph E. Swanson, etc.* v. *Helvering,* No. 108, October Term, 1935, and *Helvering* v. *E. E. Combs and Edward Everett, etc.,* No. 238, October Term, 1935.

The declaration of trust involved in this case was executed by five co-owners of twenty apartment houses in the city of Boston. The declaration provided that the five as trustees should hold the apartment houses and any other similar property which might be acquired, should operate the property, lease or sell it, invest the proceeds of sales, and should distribute to the five individuals or their representatives or assigns any income and any proceeds of sales not required for the development or improvement of the properties. The beneficiaries as such had no control over the trust, but by virtue of the fact that the five original beneficiaries (who were still the beneficiaries during the taxable years here involved) were also trustees, they had control.

The Board of Tax Appeals found that there were no shares of beneficial interest, that the trustees held no meetings and kept no minutes of meetings (R. 18), and we concede that so far as the record shows the trust employed no other corporate devices in transacting its business. It is our position that the court below erred in assuming that these matters were important and in failing to hold that the trust was an association because it was doing business.

I

That the trust was doing business is clear. The Board so found, and its finding is supported by the undisputed facts. Two of the five trustees devoted

their entire time and a third devoted part of his time to developing, improving, and managing the properties. Moreover, the properties held in trust cost $3,000,000, contained 1,500 tenants, produced gross rentals of over $400,000 a year, and required a pay roll (exclusive of trustees' compensation) of $25,000 a year.

We submit that the Board's finding on the question of whether the trust was doing business should have been regarded as a determination of fact which was conclusive upon the court below because supported by substantial evidence. *Ittleson* v. *Anderson,* 67 F. (2d) 323 (C. C. A. 2d). However, even if that determination be regarded as a mixed question of fact and law, there can be no doubt that it was doing business under the decisions of this and other courts. *Hecht* v. *Malley,* 265 U. S. 144; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Tyson* v. *Commissioner,* 68 F. (2d) 584 (C. C. A. 7th), certiorari denied, 292 U. S. 657; *Willis* v. *Commissioner,* 58 F. (2d) 121 (C. C. A. 9th); *Trust No. 5833, Security-First Nat. Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544; *Sloan* v. *Commissioner,* 63 F. (2d) 666 (C. C. A. 9th). Cf. *Gardiner* v. *United States,* 49 F. (2d) 992 (C. C. A. 1st).

Two of the cases reported *sub nom. Flint* v. *Stone Tracy Co., supra,* were those of the Park Realty Company and the Broadway Realty Company. The chief question presented in those cases was whether the companies were doing business within

the meaning of the Excise Act of 1909 which imposed an excise tax measured by net income on corporations doing business. On that issue this Court said (pp. 170–171):

> Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc.
>
> * * * * *
>
> The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.
>
> * * * * *
>
> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of

> this statute, and in the capacity necessary to make such organizations subject to the law.

The Hecht and the Haymarket trusts involved in *Hecht* v. *Malley, supra,* were likewise engaged in operating and managing rental real estate for profit and the Court there held that they were doing business.

The situation is quite different from one in which the only property owned by the trust is subject to a single lease and the trustees have only to collect the rent. See *McCoach* v. *Minehill Railway Co.,* 228 U. S. 295; *United States* v. *Emery,* 237 U. S. 28; *Lansdowne Realty Trust* v. *Commissioner,* 50 F. (2d) 56 (C. C. A. 1st). That the decisions in the *Minehill Railway* case and the *Emery* case are not to be extended to other situations is shown clearly by the decisions in *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, and *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503. See also *Harmar Coal Co.* v. *Heiner,* 34 F. (2d) 725, certiorari denied, 280 U. S. 610.

In the *Chile Copper Company* case, the Court said (p. 455):

> It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption "when not engaged in business"

ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.

In this case the trust was organized to carry on an enterprise for profit and it was doing what it was organized to do.

The court below apparently thought that the Coleman-Gilbert Associates was not organized to conduct a business for profit because it considered that the purpose of the creators of the trust was to prevent a partition and division of the property in case one of the owners died within a definite period of time. In so holding, we think the court failed to distinguish between the occasion for the undertaking and its purpose. It may be true that the five individuals would not have entered into the trust agreement if they had not desired to prevent a partition. But in entering into the agreement, they did so with a view to making the profit they might make through the development and renting of apartment houses. If the same five individuals had discovered a desirable business site for rent and had decided to operate a grocery store under the same form of agreement, no one would argue that their purpose was to occupy a vacant building and not to operate a business for profit. So in this case the desire to prevent a partition of the property was merely a circumstance which influenced their decision to enter into an agreement

for the use of their property in a profit-making undertaking.

Nor is there any theory under which the Coleman-Gilbert Associates can be regarded as a liquidating trust. The trustees were not engaged in trying to sell the property as fast as possible so that the beneficiaries could collect their interests in cash, but were engaged in improving and renting a large number of apartment houses. The case, therefore, is clearly distinguishable from those in which corporations or associations originally organized for liquidation or subsequently devoted to liquidation after amendments to their charter or trust agreement have been held not to be engaged in business. See *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187; *White* v. *Hornblower,* 27 F. (2d) 777 (C. C. A. 1st); *Commissioner* v. *Atherton,* 50 F. (2d) 740 (C. C. A. 9th); *Commissioner* v. *Morriss R. Co. Trust No. 2,* 68 F. (2d) 648 (C. C. A. 7th).

II

We submit, therefore, that the only substantial question in this case is whether a trust which is doing business but admittedly employs no corporate forms is an association. This issue is presented in a somewhat different form than it was in the *Morrisey* case, *supra,* both because the trust involved here admittedly employed no corporate forms and because it could not under any theory be regarded as a liquidating trust, which the trustees

in the *Morrissey* case argued was the situation there.

As pointed out in our brief in the *Morrissey* case, which we incorporate herein by reference, the decisions of the Circuit Courts of Appeals are in conflict as to whether the doing-business test is sufficient in itself or whether the trust must employ certificates of stock, seals, and other devices of a corporation. (See Appendix B of that brief and also pages 19–25.) We submit that the better view is that the doing-business test is conclusive, as was held in *Ittleson* v. *Anderson,* 67 F. (2d) 323 (C. C. A. (2d); *Twin Bell Oil Syndicate* v. *Helvering,* 70 F. (2d) 402 (C. C. A. 9th), reversed on other grounds, 293 U. S. 312; and *Little Four Oil & Gas Co.* v. *Lewellyn,* 35 F. (2d) 149 (C. C. A. 3d), certiorari denied, 280 U. S. 613.

While this Court in *Hecht* v. *Malley, supra,* did not in specific language state that the doing-business test was conclusive, it apparently relied upon that test in holding that the three trusts there involved were associations within the meaning of Section 1 of the Revenue Act of 1918, which is identical with the statutes here involved. The Court there said (p. 161):

> We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a

> corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; this being true independently of the large measure of control exercised by the beneficiaries in the *Hecht* and *Haymarket* cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust.

It is true that in the process of arriving at that result the Court cited a dictionary definition of the word "association" as "a body of persons united without charter, but upon the methods and forms used by incorporate bodies for the prosecution of some common enterprise", but the Court did not rest its decision upon finding that the trusts there involved employed corporate forms. In fact, the opinion does not show that the trusts used seals or had formal meetings of trustees similar to meetings of board of directors' meetings, or kept minutes of such meetings, or that they adopted any corporate forms other than certificates of beneficial interest.

None of the regulations of the Treasury Department issued subsequent to the decision of this Court in *Crocker* v. *Malley*, 249 U. S. 223, on March 17, 1919, have laid any emphasis on resemblances to corporate forms.

It will be noted that under Article 57 of Regulations 33, promulgated under the income-tax provisions of the Revenue Act of 1916, as amended by the Revenue Act of 1917, there was a requirement that there be certificates of beneficial interest.

This was omitted from regulations promulgated under the income-tax provisions of the Revenue Act of 1918 (Regulations 45, *infra*), and from all subsequent regulations. It also appeared in the capital stock regulations. See T. D. 2383. Articles 12 and 14 of Regulations 50, approved April 29, 1919 (T. D. 2835, *infra*) changed this. See also Articles 2 and 3 of Regulations 50, revised May 25, 1920 (T. D. 3039, *infra*),[1] and T. D. 3361 and T. D. 3622, *infra*.

The regulations promulgated subsequent to the decision of this Court in *Hecht* v. *Malley, supra,* have distinguished between trusts in which the

[1] All of the revenue acts, beginning with the Revenue Act of 1918 through the Revenue Acts of 1926 and 1928, here involved, have provided that the term "corporation" wherever used in the Act includes "associations, joint-stock companies, and insurance companies" and have thus made the same definition apply to capital stock taxes and income taxes. Section 38 of the Excise Act of 1909, which imposed an excise tax measured by income on every "corporation, joint-stock company or association" was different in that it required organization under a statute (see *Eliot* v. *Freeman*, 220 U. S. 178), but even in regulations issued under that Act no particular insistence was made on observance of minor corporate forms. See T. D. 1571, *infra*. The Revenue Act of 1913, which was before the Court in *Crocker* v. *Malley*, *supra*, did not impose a capital stock tax but imposed a tax on the income of every "corporation, joint-stock company or association" (see Sec. II G (a)), as did Section 10 of the Revenue Act of 1916. Section 407 of the latter Act also imposed a capital stock tax on every "corporation, joint-stock company or association" organized under a statute. Under Section 200 of the Revenue Act of 1917 an excess profits tax was imposed on "joint-stock companies or associations."

trustees are merely holding property for the collection of income and its distribution and are not engaged in carrying on a business, either by themselves or with the beneficiaries, and trusts in which the trustees are associated together with similar or greater powers than the directors of a corporation for the purpose of carrying on some business enterprise. That is true of the regulations involved in this case. See Articles 1502 and 1504 of Regulations 69, promulgated under the Revenue Act of 1926, *infra*, and Articles 1312 and 1314 of Regulations 74. See also T. D. 3598, III–1 Cumulative Bulletin 489; I. T. 2061, III–2 Cumulative Bulletin 5; Articles 1502 and 1504 of Regulations 65, promulgated under the Revenue Act of 1924, as amended by T. D. 3748, IV–2 Cumulative Bulletin 7, and T. D. 3749, IV–2 Cumulative Bulletin 6.

For reasons stated in the *Morrissey* brief, we think that the regulations are not broad enough in that they apparently do not cover a case where there is a single trustee engaged in managing a business trust, a defect which was remedied in Articles 801–2 and 801–3 of Regulations 86, promulgated under the Revenue Act of 1934, but they nevertheless emphasize the doing-business test and make no reference to external resemblances to a corporation.[1]

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[1] Section 704 (b) of the Revenue Act of 1928, a retroactive provision, recognizes that a certain type of trust with a single trustee was, under then existing regulations, treated as a strict trust in earlier years.

Hence the courts which, as the court below, have relied upon a balancing of elements similar to a corporation and those dissimilar in a given case (see, for example, *Commissioner* v. *Brouillard*, 70 F. (2d) 154 (C. C. A. 10th), certiorari denied *sub. nom. Helvering* v. *Pryor & Lockhart Development Co.*, 293 U. S. 574) can derive no real support from the decision of this Court in *Hecht* v. *Malley, supra,* or from Treasury Regulations.

Nor do we think that that construction is warranted under the statute. Under Section 219 of the Revenue Act of 1926, *infra,* and the corresponding sections of the Revenue Act of 1928 under which trusts are taxed as individuals, the statute refers to trusts for the benefit of infants, unborn children, and other classes found in the traditional type of trusts for conservation. Moreover, in assimilating associations to corporations and not to individuals in the statute, Congress must be considered to have found its justification in the substantial resemblances between corporations and associations and not in mere matters of form, just as in other tax situations. See *United States* v. *Phellis*, 257 U. S. 156; *Weiss* v. *Stearn*, 265 U. S. 242; *Corliss* v. *Bowers*, 281 U. S. 376; *Burnet* v. *Wells*, 289 U. S. 670; *Burnet* v. *Guggenheim*, 288 U. S. 280.

In *Hemphill* v. *Orloff*, 277 U. S. 537, this Court said, p. 550:

> Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers

> of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. This was distinctly pointed out in *Oliver* v. *The Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531, affirmed here *sub nom. Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566. See also *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 162; *Hecht* v. *Malley*, 265 U. S. 144; *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110; *Hamilton* v. *Young*, 116 Kan. 128; *Weber Engine Co.* v. *Alter*, 120 Kan. 557; *State* v. *Hinkle*, 126 Wash. 581; *State* v. *Paine*, 137 Wash. 566.

See also *Senior* v. *Braden*, decided by this Court May 20, 1935.

Flint v. *Stone Tracy Co., supra*, involved the excise tax on the privilege of doing business imposed by the Excise Act of 1909 on every "corporation" and "joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws * * *". The argument was made that the tax was unconstitutional because a similar tax was not imposed on partnerships or individuals. In rejecting that argument, the Court said (pp. 161–162):

> The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by

> individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Thus, the elements of the continuity of the business, *without interruption by death or dissolution*, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors and the general absence of individual liability were regarded as the elements which distinguished a business operated by a corporation from one operated by a partnership or individual and as the justification for the tax in *Flint* v. *Stone Tracy Co.* We

submit that if the doing-business test is not regarded as conclusive in determining what corporations should be regarded as associations, the existence of these elements in a trust which is doing business should be regarded as sufficient reason for assimilating it to an association and hence to a corporation rather than to an individual.

This was the view of the Circuit Court of Appeals for the Seventh Circuit in the case of *Reinecke* v. *Kaempfer*, 72 F. (2d) 469, certiorari denied, 294 U. S. 708, where the court said (pp. 470–471):

> As we pointed out in *Sears, Roebuck, etc.*, v. *Commissioner*, 45 F. (2d) 506, there are various kinds of corporations, some with and some without shares of stock; and some for and others not for pecuniary profit. And it was there held that shares of stock, or the equivalent, and assignable interests of beneficiaries were not essential to constitute a taxable association under the statute. The entity there involved was without shares of capital stock and without assignable interests, but it was held to be a taxable association under the act.
>
> We are satisfied that the similitude referred to is not in those essentials which distinctly stamp the entity as a corporation, but rather in the business carried on and the manner of its transaction. This entity carried on its business in substantially the same way that a corporation would have carried it on. It regularly bought and sold merchandise for the purpose of realizing

> profit thereon; it constituted the persons to carry on the business, and even made provision for exemption of the trustees from personal liability for trust obligations, much as in the case of business corporations.

In the present case the trust was doing business. The trust instrument expressly provided that the trustees should have no power to bind the beneficiaries, that those dealing with the trust should look to the assets of the trust for payment and that the trustees should not be liable except for breach of trust or wilful default. (R. 8.) The interests of the beneficiaries could be alienated, although they were not represented by certificates of interest, and the trust was to continue regardless of changes in the beneficial interests. The management of the enterprise was in the trustees, who were to act for whatever persons held the beneficial interests. There was consequently the absence of personal liability, the continuity and the centralized control that are characteristic of a corporation.

We submit that this was all that was required under the statute for the trust to be classified as an association.

It is our view that the question of control is no longer important, but if the Court should entertain other views, we point out that there was actual beneficiary control during the taxable years involved because the five trustees and the five beneficiaries were identical.

In *Crocker* v. *Malley, supra,* this Court held that a trust was not an association where there was not beneficiary control. In *Hecht* v. *Malley, supra,* the Court held that a trust could be an association regardless of beneficiary control, where it was doing business. The courts generally have accepted the view, correctly, we think, that the question of beneficiary control has ceased to be controlling (*Little Four Oil & Gas Co.* v. *Lewellyn, supra; Ittleson* v. *Anderson, supra; White* v. *Hornblower, supra; Twin Bell Oil Syndicate* v. *Helvering, supra*), but they have not held that a trust in which the beneficiaries do have control is not an association.

The regulations here involved, Articles 1502 and 1504 of Regulations 69 and Articles 1312 and 1314 of Regulations 74, *infra,* provide that a trust in which the beneficiaries have control is to be regarded as an association. The regulations issued under the Revenue Acts of 1932 and 1934 were changed in that respect. See Articles 1312 and 1314 of Regulations 77, and Articles 801–2 and 801–3 of Regulations 86.

We concede that the five beneficiaries do not exercise control in their capacity as beneficiaries. But they did exercise it during the taxable years here involved in their capacity as trustees, since the five persons who were the sole beneficiaries were likewise the sole trustees. This is sufficient under the decision in *Investment Trust of Mutual Investment Co.* v. *Commissioner,* 27 B. T. A. 1322, af-

firmed *per curiam*, 71 F. (2d) 1009 (C. C. A. 2d). In that case there were two classes of beneficiaries, neither of which had control as such, but the class holding the greater part of the beneficial interests acted as trustee. The entity was held to be an association. See also Sol. Op. 56, 3 Cumulative Bulletin 10, 12, to the same effect, and compare *Landsdowne Realty Trust* v. *Commissioner, supra.*

As a practical matter, the beneficiaries have control in such a case, if the Court should consider that control is required. Control is not a matter of title but of practical effect. See *Tyler* v. *United States*, 281 U. S. 497; *Corliss* v. *Bowers, supra.*

The court below did not consider this point, although it was discussed in the briefs and may be considered here, if the Court should still consider that control is important.

The court below erred in its belief that to hold this trust an association would result in the kind of double taxation that this Court sought to avoid in *Crocker* v. *Malley, supra.* Under the statute involved in *Crocker* v. *Malley, supra*, a corporation receiving dividends from another corporation was taxed upon them, even though the paying corporation had been taxed upon its earnings, and the Court was undoubtedly influenced by that fact in holding that the trust there involved was not to be taxed as an association. But under the Revenue Acts of 1926 and 1928, a corporation is not taxed on dividends received from another corporation. See Section 234 (a) (6) of the Revenue Act of 1926

and Section 23 (p) of the Revenue Act of 1928. Hence, if this trust is taxed as an association it will not pay any tax or corporate dividends which it receives and there is no double taxation such as was involved in *Crocker* v. *Malley, supra.*

Any distributions which the trust itself makes (if taxed as an association) will be subject to surtax, if a surtax is applicable (but not to normal tax), as in the case of any corporation. That is not regarded as double taxation. See *Hellmich* v. *Hellman,* 276 U. S. 233.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 2. (a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

* * * * *

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but

the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sections 161 and 162 (b) and (c) of the Revenue Act of 1928 contain substantially the same provisions as the provisions of Section 219 of the Revenue Act of 1926, *supra*.

SEC. 701. DEFINITIONS.

(a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

(a) If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, or under any such ruling made after the return was filed which had not been reversed or revoked prior to the time of the termination of the taxpayer's existence.

(b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

Art. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form

is an association or corporation within the meaning of section 2.

ART. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

Articles 1312 and 1314 of Regulations 74 are substantially the same as Articles 1502 and 1504 of Regulations 69, *supra*.

T. D. 1571, Treasury Department, Internal Revenue Decisions, Vol. 12, p. 131 (approved December 3, 1909):

REGULATIONS RELATING TO THE ASSESSMENT AND COLLECTION OF THE SPECIAL EXCISE TAX IMPOSED BY SECTION 38, ACT OF AUGUST 5, 1909, ON CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES

* * * * *

ARTICLE I

The attention of collectors and others is specially called to the fact that the tax imposed by this section of the law applies to all corporations, joint stock companies, associations, or insurance companies described (except those specifically exempted), without reference to the kind of business carried on, and that the tax is to be computed upon the NET INCOME of such corporations, joint stock companies, associations, and insurance companies, which shall be calculated by subtracting from the gross income received from all sources during the year certain deductions specifically set forth in the statute.

Every corporation, joint stock company, association, or insurance company not specifically enumerated as exempt shall make the return required by law, whether it may have net income liable to tax or not.

In the case of corporations, joint stock companies, associations, or insurance companies organized under the authority of the United States or any State or Territory thereof, including Alaska and District of Columbia, such net income relates not only to the business carried on within the confines of the United States, but to income received from business transacted in any foreign country as well. In case of corporations,

joint stock companies, and associations organized under the authority of foreign countries the terms "Gross income," "Net income," and "Authorized deductions" relate only to business transacted within the United States or any State or Territory thereof.

Regulations 33, revised (as printed in T. D. 2690), promulgated October 3, 1917.

ART. 57. *Corporations defined.*—"Corporation" or "corporations", as used in these regulations, shall be construed to include all corporations, joint-stock companies and associations, and all insurance companies coming within the terms of the law, as well as all business trusts organized or created for the purpose of engaging in commercial or industrial enterprises, the capital of which is evidenced by certificates or shares of interest issued or issuable to members on the basis of which profits are distributed or distributable. Such organizations will be hereinafter referred to as corporations.

Regulations 45 (1919 Ed.), promulgated under the Revenue Act of 1918:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization.

T. D. 2835, Treasury Decisions, Internal Revenue, Vol. 21, p. 481:

REGULATIONS 50 (APPROVED APRIL 29, 1919), RELATING TO THE CAPITAL STOCK TAX UNDER TITLE X OF THE REVENUE ACT OF 1918

ART. 12. *Domestic corporation; association.*—Associations and joint-stock companies include associations, common-law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. But see article 13–15.

ART. 14. *Domestic corporation: association distinguished from trust.*—Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute.

T. D. 3039, Treasury Decisions, Internal Revenue, Vol. 22, p. 321:

REGULATIONS 50, REVISED MAY 25, 1920, RELATING TO THE CAPITAL STOCK TAX

ART 2. *Corporations.*—The term "corporation" includes associations, joint-stock companies, whether created by statute or by contract, and insurance companies, but not partnerships, properly so called, and whether or not organized for profit or having a capital stock represented by shares.

ART. 3. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization. But see articles 4, 5, 6, 7. An organization, the membership interests in which are transferable without the consent of all of the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association.

ART. 7. *Massachusetts trusts.*—The test of liability in all cases involving trusts of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in

complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust.

T. D. 3361, Treasury Decisions, Internal Revenue, Vol. 24, pp. 861–863:

REGULATIONS 64, 1922 EDITION, APPROVED JUNE 15, 1922, RELATING TO THE CAPITAL STOCK TAX UNDER THE REVENUE ACT OF 1921

ART. 3. *Corporations.*—The term "corporation" includes associations and joint-stock companies, whether created by statute or by contract, but not partnerships, properly so-called. It is immaterial whether the companies were organized for profit or have a capital stock represented by shares.

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net in-

come of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization. But see articles 5, 6, 7, 8. An organization, the membership interests in which are transferable without the consent of all of the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association.

ART. 8. *Massachusetts trusts.*—The test of liability in all cases involving trusts of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust.

T. D. 3622, Treasury Decisions, Internal Revenue, Vol. 26, pp. 546–548:

REGULATIONS 64, APPROVED JULY 29, 1924, 1924 EDITION, RELATING TO THE CAPITAL STOCK TAX.

ART. 3. *Corporations.*—The term "corporation" includes associations and joint-stock companies, whether created by statute or by contract, but not partnerships, properly so called. It is immaterial whether the companies were organized for profit or have a capital stock represented by shares.

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization.

ART. 8. *Trusts.*—Two distinct classes of trusts are recognized, namely, holding trusts and operating trusts.

Holding trusts are those in which the trustees are merely holding property for the collection of the income and distributing it among the beneficiaries and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. Such trusts are not associations within the meaning of the law and are not subject to the tax.

Operating trusts are those in which the trustees are not restricted to the mere collection of funds and paying them over to the beneficiaries but are associated together in much the same manner as directors in a corporation for the purpose of, and are actually engaged in, carrying on some business enterprise. These trusts, whether of the Massachusetts type or otherwise, are to be deemed associations within the meaning of the act, independently of any control exercised by the beneficiaries, and subject to the tax.

Treasury Regulations 64 (Capital Stock Tax), under Section 215 of the National Industrial Recovery Act, c. 90, 48 Stat. 195:

ART. 3. *Corporations.*—The term "corporation" includes associations, joint-stock companies, and insurance companies, but not partnerships. (See Article 5.)

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation.

ART. 6. *Association distinguished from trust.*—Where trustees merely hold property for the collection of income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, no association exists. Where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but have powers similar to or greater than those of the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

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In the

Supreme Court of the United States.

October Term, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue, *Petitioner*,

v.

COLEMAN-GILBERT ASSOCIATES.

BRIEF FOR RESPONDENT, COLEMAN-GILBERT ASSOCIATES.

Opinions Below.

This case comes here from the Circuit Court of Appeals for the First Circuit, whose decision is reported in 76 Fed. (2d) 191, reversing the decision of the United States Board of Tax Appeals reported in 30 B.T.A. 1463.

Jurisdiction.

This case is here on certiorari granted by the Court October 14, 1935 (R. 48).

Question Presented.

The question is whether Coleman-Gilbert Associates is an association, taxable as a corporation.

Statutes and Regulations Involved.

The statutes involved are the Revenue Act of 1926, c. 27, 44 Stat. 9, sec. 2 (*a*) (2); the Revenue Act of 1928, c. 852, 45 Stat. 791, sec. 701 (*a*) (2). These statutes are set out at length in Appendix hereto. The Regulations involved are Regulations 62, article 1504, Regulations 69, articles 1502 and 1504, and Regulations 74, articles 1312 and 1314.

Statement.

Facts additional to those set out in the statement of the Government counsel in brief are as follows:

The apartment houses involved and constituting the assets of the trust had been owned and operated for some time prior to the formation of the trust by the five trustees as tenants in common (R. 15, 18 and 22), three of them being the active operators (R. 23 and 24). After the formation of the trust, the respective equitable interests of the five individuals as beneficiaries were identically the same as when they were tenants in common of the properties (R. 11 and 22). The properties were handled the same after the formation of the trust as before, and there was no change in the books (R. 24). The trustees never held any meetings or kept any records of trustees' proceedings, and no salaries were paid the trustees, two of whom devoted their whole time to the trust affairs (R. 23 and 24).

The purpose of forming the trust was to prevent a partition of the property by some of the heirs of the tenants in common in case of the death of any one of them, and the trust instrument specifically precluded a partition (R. 24 and 9). The provision giving the trustees power to purchase other property was simply to protect the property of the trust in case of need, and was a power that was never exercised (R. 24).

The trust was limited to a duration of fifteen years, at the end of which time the property must be sold and the proceeds distributed, and the trustees could at any time within said period sell the property and terminate the trust (R. 8 and 12). The trustees could at any time alter the terms of the trust except that they could not extend it beyond fifteen years (R. 12). Pending the termination of the trust, the net profits and any surplus realized from sales were distributable to the beneficiaries (R. 10).

There was no provision for other than the unanimous action of all the trustees in all affairs of the trust, and there were no certificates of beneficial interest issued or provided for (R. 8, 12 and 18).

Summary of Argument.

The facts that were before the Board of Tax Appeals and the Circuit Court of Appeals permit of only one conclusion, namely, that Coleman-Gilbert Associates were not operating in quasi-corporate form and were not an association within the meaning of said Revenue Acts.

Argument.

In the case of *Hecht* v. *Malley*, 265 U.S. 144, this Court said, at page 157:

> "The word 'association' appears to be used in the Act in its ordinary meaning. It has been defined as a term 'used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise.' 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3d Rev.) 269; 3 Am. & Eng. Enc. Law (2d ed.) 162; and Allen v. Stevens, 33 App. Div. 485, 54 N. Y. Supp. 8,

23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are: 'In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation.' Webst. New Internat. Dict. '[U.S.] An organized but unchartered body analogous to but distinguished from a corporation.' Pract. Stand. Dict."

In the case at bar, five tenants in common of certain parcels of real estate, in order to preclude any partition of their respective undivided interests for at least a period of fifteen years, entered into a written agreement calling themselves trustees, under the name of "Coleman-Gilbert Associates," of the property owned by them. This agreement bound all five to concerted action in respect of the property and required the disposal of it within fifteen years. There was no change in the method of handling the property, the same three who had been active continuing to be the active members of the group as theretofore. There was no change in the keeping of the books of account and no change in the proportionate beneficial interests. No remuneration was paid to any of the five for services, and there were no formalities of meetings or records other than regular books of account, which were the same as had always been kept. There were no certificates issued or anything to represent the respective interests of the five in the property after the trust was formed, different from what had previously existed.

There was no semblance to corporate organization or procedure in Coleman-Gilbert Associates. The trustees could take action only as a unit, as there was no majority control provided for. Unlike directors of a corporation,

but more like partners, the trustees could modify or terminate the provisions of the instrument under which they functioned. The agreement of trust created what amounted to an operating arrangement among the tenants in common in respect of the property so held more in the nature of a partnership than in the nature of a corporation.

The fact that the beneficiaries of the trust by the provisions of the trust instrument are exempted from personal liability is the ordinary legal consequence that follows in the case of any trust, as the general rule is that beneficiaries are not personally responsible for claims arising from operation of the trust property, and this provision in itself cannot be said to create a resemblance to a corporate organization as distinguished from a trust. (See American Law Institute "Restatement of Law of Trusts," vol. II, sec. 274.)

No more does the fact that the beneficiaries of the trust could, in the absence of specific prohibition, assign their interests have any tendency to create a resemblance to a corporation, as, in the case of most pure trusts, the beneficial interests are assignable at will.

The provision that the interests of the beneficiaries of the trust should be personalty and not treated as realty does not lead to the conclusion that this was a feature peculiarly characteristic of a stock interest in a corporation rather than an interest in a realty trust. The realty in this case was held for purposes of sale, the trust instrument specifically providing for its sale not later than fifteen years from date and the beneficiaries' interest was limited to the rents and profits during the period of the trust existence, with a right to distribution of the proceeds of the sale at the termination of the trust. The general rule is that, in cases of trusts of real property with such provisions, the interests of the beneficiaries are treated as per-

sonal property rather than real property. (See American Law Institute "Restatement of the Law of Trusts," vol. I, secs. 130 and 131.)

We have here a situation where tenants in common, holding both the legal and equitable interests in real estate, declared themselves common trustees of said property for their own benefit. The legal effect when these tenants in common respectively conveyed their respective undivided interests in the real estate to all five of themselves as trustees for the benefit of themselves in exact proportion to their previous undivided interests was to put the legal title in the five as joint tenants and the equitable interests (if they had continued as interests in realty rather than personalty) remained as tenancies in common.

As is said in the "Restatement of the Law of Trusts," adopted and promulgated by the American Law Institute, vol. I, sec. 99 (*b*):

> "On the other hand, there can be a trust where there are several beneficiaries who are also the trustees. In such a case each of the beneficiaries has an equitable interest which is separate from the legal interest held by the whole group. As trustees they hold the legal title as joint tenants, and ordinarily they hold the beneficial interests as tenants in common. No one of them, without the concurrence of the others, can properly transfer an undivided legal interest in the property free of trust. If a creditor of one of the beneficiaries seeks to reach his interest he can do so only by proceedings appropriate for reaching an equitable interest, and cannot levy execution in an action at law upon his legal interest."

It is contended that the provision in the Declaration of Trust that there shall be no personal responsibility of the

trustees to third parties partakes of the corporate character. A trustee can always, in making a contract in behalf of the trust, limit liability to the trust estate. The insertion of a general provision to that effect in the trust instrument is of no effect whatever upon third parties unless they have knowledge, either actual or constructive, of the existence of the limitation and enter upon the contract with such knowledge. The effectiveness of the limitation, in other words, is dependent upon its being one of the terms of each contract when made by the trustee with a third party. (Restatement of the Law of Trusts, vol. II, sec. 263.)

Any powers of the trustees under the instrument of trust extending beyond the administration and disposal of the specific property conveyed to the trustees were inserted merely as precautionary and protective provisions, and were never exercised, and have no significance to determine the character of the Coleman-Gilbert Associates. *Commissioner* v. *Pryor & Lockhart Development Co.*, 70 Fed. (2d) 154, 158. *Gardiner* v. *United States*, 49 Fed. (2d) 992.

The Court below quoted pertinent language in the opinion in *Commissioner* v. *Pryor & Lockhart Development Co.*, *supra*, as follows (R. 43):

> "Where an entity of this kind resembles a corporation in some respects and that of a partnership in others—that frequently being the case—the features of similarity should be compared and the marks of dissimilarity contrasted. The resemblances should be balanced. It should be determined by that method the one to which the enterprise is predominantly akin in the method, mode, and form of procedure in the conduct of its business. If it be a corporation, it fall within that category; if a partnership, it should be placed in that class and should be taxed accordingly."

Referring to the contention that the regulations of the Treasury Department should have a controlling effect, these regulations, as the Court below pointed out, have been changed from time to time and have not followed closely the language of the courts, and it is not reasonable to assume that Congress adopted each change in the regulations without at any time changing the language of the various Revenue Acts adopted.

The provision in Regulations 69, art. 1504, that, "Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute," would result in many trusts established by testamentary provisions being held to be associations under the Revenue Acts.

A test here is whether the trustees were "conducting business after the mode and manner of a corporation" or "doing nothing more than trustees ordinarily would be called upon to perform in the management of trust property." *Lansdowne Realty Trust* v. *Commissioner,* 50 Fed. (2d) at 58.

Speaking of the activities of the trustees, the Court below in its opinion said (R. 44 and 45):

> "The three active members of the trustees were undoubtedly conducting the management of the trust property with a view to ensuring an income for the beneficiaries of the trust, who were the equitable if not the legal owners of the res; but it does not appear that they exercised any powers that they were not bound to exercise by reason of their ordinary duties as trustees in preserving the properties under a pure trust, viz: keeping them in repair, renting them to the best

advantage, and collecting the rentals, and paying operating expenses. In other words, they did nothing that they were not bound to do in their capacity as trustees, if the trust was what may be termed a pure trust, in which the trustees were expressly authorized to borrow money, if necessary, for carrying out the purpose of the trust.

"From the activities of the trustees alone we do not think the Board was warranted in holding as a matter of law that the trust was an association. While there may have been sufficient evidence to warrant the Board in finding that they were conducting a business enterprise, and with the purpose of ensuring an income for the beneficiaries during the continuance of the trust, and while they may have exercised powers in some respects as great as those of the directors of a corporation, they did not exercise them in the manner of directors of a corporation. They held no meetings; they kept no records; their acts were not determined by a majority vote. Their tenure as trustees was during life or the duration of the trust, unless they voluntarily resigned. Two trustees were wholly inactive, and a third only active in part in the management. They conducted the business in the same manner that it had been conducted before the trust was formed.

"In a case not clearly falling on one side or the other of the line between an association and a trust, we think the Board in comparing the resemblance of a trust to a corporation, should give due weight to the purpose for which the trust was organized. The uncontradicted evidence in these cases discloses, we think, that the Coleman-Gilbert Association was not organized to conduct a business for profit; that while the trustees did manage the property so that it produced an income for the beneficiaries, it was only in-

cidental to the main purpose for which the trust was created. The purpose of the creators, according to the uncontradicted evidence, was to prevent a partition and division of the property in case one of the owners died within a definite period of time. It was deemed in the interest of the coowners and their heirs that the properties should be kept intact for a period of fifteen years. There is no evidence to warrant any inference that it was organized in order that it might be better managed, or that any additional financial advantage would accrue from creating a trust. If every trust terminating in five, ten or fifteen years in which the trust res consisted of rentable real estate is managed faithfully and prudently by the trustees with a view to producing the largest income for the cestuis qui trustent is to be taxed as an association, few strictly pure trusts would escape a double taxation upon its income."

The Government stresses the so-called "business test" as a determining factor in classifying a trust as an association. It is submitted that what business a trust is doing is essentially immaterial; that the material inquiry is: How is the trust carrying on its operations? In the case of *Hecht* v. *Malley, supra,* the Court necessarily inquired into whether or not the trust there involved was engaged in carrying on business, as the statute under consideration was an excise tax imposed on the privilege of doing business. The case at bar involves the imposition of an income tax on corporations, a term which, by the provisions of the Act, also includes associations. This tax is imposed upon all corporations and associations (excepting only certain specified classes) regardless of what their business may be and regardless of whether or not they are carrying on the business for which they were organized. It is im-

posed upon all gains, even those that might result from liquidation proceedings. Such being the statute involved, it would seem to be immaterial to inquire whether a corporation or an association were actually engaged in ordinary business operations or otherwise.

The only instance where the nature of the activity of the trust might be material would be where such activity could not be exercised through the corporate form and method, and in such case there would be no issue.

The test that should be applied to determine whether a trust is to be treated as an association is to ascertain whether in its mode and method of procedure it is following to a substantial degree the mode and method used by incorporated bodies. To point out that the trust has certain characteristics such as continuity, freedom from personal liability and centralized direction in its affairs, which are also the characteristics of corporations, as a proof of the existence of an association rather than a trust, is begging the question. Those common characteristics have been features of trusts since long before corporations were created by statute, and merely demonstrate that corporations have some of the characteristics of trusts. To make a trust an association, it must have in its structure or method of operation to a substantial degree those elements which are peculiar to corporations as distinguished from trusts. Such corporate elements are not found in Coleman-Gilbert Associates.

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

"Sec. 2 (*a*) When used in this Act—

* * * * * * * *

"(2) The term 'corporation' includes associations, joint-stock companies, and insurance companies."

(U. S. C. App., Title 26, sec. 1262.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 701 (*a*) (2) is identical with section 2 (*a*) (2) of the Revenue Act of 1926, *supra*.

Regulations 62, promulgated under the Revenue Act of 1922:

"Art. 1504. Association distinguished from trust. Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists and the cestuis que trust are liable to tax as beneficiaries of a trust the income of which is to be distributed periodically, whether or not at regular intervals. But in such a trust if the trustees pursuant to the terms thereof have the right to hold the income for future distribution, the net income is taxed to the trustees instead of to the beneficiaries. See Section 219 of the Statute and Arts. 341-348. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute."

Regulations 69, promulgated under the Revenue Act of 1926:

"Art. 1502. Association. Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, whether there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation within the meaning of section 2."

"Art. 1504. Association distinguished from trust. Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341-347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the

mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute."

Regulations 74, promulgated under the Revenue Act of 1928:

Articles 1312 and 1314 are substantially the same as articles 1502 and 1504 of Regulations 69, *supra*.

SUPREME COURT OF THE UNITED STATES.

Nos. 78 and 79.—October Term, 1935.

78 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Coleman-Gilbert Associates.

79 Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, vs. Coleman-Gilbert Associates.

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[December 16, 1935.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Commissioner of Internal Revenue determined deficiencies in income taxes for the years 1927 to 1929 upon the ground that respondent was taxable as an association. The decision of the Board of Tax Appeals, sustaining this ruling, was reversed by the Circuit Court of Appeals. 76 F. (2d) 191. In view of the conflict of decisions as to the test to be applied, we granted certiorari. See *Morrissey* v. *Commissioner*, decided this day.

From the facts, as found by the Board of Tax Appeals, it appears that respondent was formed by an indenture of trust in November, 1926. The creators of the trust were Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine, and Lena Levine. They were co-owners of real property consisting of about twenty apartment houses in the city of Boston and vicinity.

The property had originally been owned by Harry Coleman, Bernard Gilbert and Harris Levine in equal shares, but subsequently Coleman and Levine transferred to their wives one-half of their interests. These five persons had for some time been associated in the business of owning and operating apartment houses. By the trust instrument, which recited a contemporaneous conveyance of the property to themselves, they declared that the real estate so conveyed, and any real estate thereafter acquired under the trust, should be held by them in trust for the purposes described, with the designation "Coleman-Gilbert Associates". The

trust was to continue for fifteen years unless sooner terminated by sale and distribution of the trust estate. The trustees were to hold the property in order to improve and dispose of it for the benefit of the persons named as "*cestuis que trustent*" and beneficiaries, and their respective representatives and assigns, devisees, or legatees" in the shares provided in the instrument. Except as stated, the beneficiaries were to have no interest in the trust property, and "especially" they were to have "no right to call for any partition thereof". The interests of the beneficiaries were to be personal property, and the death of any one or of all the beneficiaries was not to determine the trust nor entitle the legal representatives of the decedent to an accounting by the trustees.

The trustees were to have the "full power and discretion" of absolute owners, with authority to invest and reinvest the trust property, including its income, in mortgages or in obligations secured upon real estate, and "in the purchase and improvement of real estate situated in the cities or towns of the Commonwealth of Massachusetts". The trustees were authorized to sell at public or private sale any part or all of the trust property upon such terms as they might see fit, "to improve, to lease for a term beyond the possible termination" of the trust, or for any less term, "to hire for improvement or otherwise, to let, to exchange, to release, to partition", to borrow money, and to execute all necessary contracts. Funds in the possession of the trustees, being "the proceeds of sales or otherwise", or net income, which was "not required in their judgment for development or improvement of the trust property", were to be divided and paid over annually, or oftener, if convenient, equally among the said beneficiaries and their respective representatives and assigns in the proportions stated. The trustees were to have no power to bind the beneficiaries personally, and the trustees were to be responsible only for willful default and breach of trust. There was also provision for the resignation of trustees, and in case of death or resignation of a trustee, the surviving trustees were to appoint successors, and if they failed to do so, the beneficiaries were to have the right of appointment.

The Board of Tax Appeals found that the trust owned and operated some twenty apartment houses, the gross annual rents of which amounted to about $420,000. There were approximately 1500 tenants. The gross cost of the properties was about $3,000,000. Employees' payrolls amounted to about $25,000, and the

operating expenses to about $300,000, annually. The trustees drew no salary. Two of the male trustees devoted their entire time to the management and a third trustee was also actively engaged. An office force of three persons, besides the three operating trustees, was required to keep the necessary financial records of the trust. There were no "building managers" or superintendents. The trustees supervised the maintenance of the trust properties looking after their operating condition, collecting rents, ordering repairs, purchasing supplies, arranging loans and supervising office details, securing new tenants and generally operating the trust properties. The female trustees were entirely inactive.

The Board of Tax Appeals summed up its findings by saying: "These trustees, although they did not exercise all of the powers given to them in the trust instrument, were engaged, nevertheless, in carrying on a business for profit in much the same manner as the directors of a corporation are associated together for the purpose of carrying on a business enterprise".

We think that the Board was right in its conclusion that the trust constituted an association within the meaning of the revenue acts. The governing principles have been discussed in *Morrissey* v. *Commissioner, supra*, and need not be restated. The small number of persons in the trust now before us does not present a difference in the legal aspect of their enterprise from the standpoint of the statutory classification. A few persons, as well as many, may form an association to conduct a business for their common profit. Nor is the absence of provision for control by the beneficiaries, as such, determinative. The fact that the enterprise was confined to dealings in real property, its management and improvement, does not prevent its being classified as an association. See *Swanson* v. *Commissioner*, decided this day. The Circuit Court of Appeals, while not questioning the sufficiency of the evidence to warrant the Board of Tax Appeals in finding that the trustees were conducting a business enterprise for the purpose of ensuring an income for the beneficiaries, and that the trustees may have exercised powers in some respects as great as those of the directors of a corporation, found a distinction in the procedure that had been followed. There had been no meetings, no records, and the acts of the trustees were not determined by a majority vote. The trustees had conducted the business in the same man-

ner as it had been conducted before the trust was formed. We think that the court unduly emphasized the mere differences of formal procedure. If such differences were to be made the test in determining whether or not an enterprise for the transaction of business constitutes an association, the subject would be enveloped in a cloud of uncertainty, and enterprises of the same essential character would be placed in different categories simply by reason of formal variations in mere procedural details. The significant resemblance to the action of directors does not lie in the formalities of meetings or records but in the fact that, by virtue of the agreement for the conduct of the business of a joint enterprise, the parties have secured the centralized management of their undertaking through designated representatives.

We agree with the Circuit Court of Appeals that weight should be given to the purpose for which the trust was organized, but that purpose is found in the agreement of the parties. Not only were they actually engaged, as the Board of Tax Appeals determined, in carrying on an extensive business for profit, but the terms of the trust instrument authorized a wide range of activities in the purchase, improvement and sale of properties in the cities and towns of the State. The parties are not at liberty to say that their purpose was other or narrower than that which they formally set forth in the instrument under which their activities were conducted. Undoubtedly they wished to avoid partition of the property of which they had been co-owners, but their purpose, as declared in their agreement was much broader than that. They formed a combination to conduct the business of holding, improving and selling real estate, with provision for management through representatives, with continuity which was not to be disturbed by death or changes in ownership of beneficial interests, and with limited liability. They had been co-owners but they preferred to become "associates", and also not to become partners. *Morrissey* v. *Commissioner, supra.*

The decrees of the Circuit Court of Appeals are reversed and the orders of the Board of Tax Appeals are affirmed.

It is so ordered.